

STATE OF NORTH CAROLINA  
COUNTY OF ORANGE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
10 EDC 1370

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[Student], by and through her Parents,        )  
D.L and [Mother],                                )  
                    Petitioners,                    )  
  )  
                    v.                                 )  
  )  
CHAPEL HILL-CARRBORO CITY                 )  
SCHOOLS BOARD OF EDUCATION,                )  
                    Respondent.                    )

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**FINAL  
DECISION**

**THE ABOVE-ENTITLED MATTER** was heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on January 5, 6, 10, 12, 13, and 14, and February 7, 8, 9, 11, 18, 21, and 24, and March 1, 2011. By agreement of the parties, the hearing was conducted at the Office of Administrative Hearings and the Board Room of the North Carolina Medical Board, both in Raleigh, North Carolina. Final arguments, proposals and memorandums of law were submitted by the parties and received by the Undersigned on June 2, 2011.

**APPEARANCES**

**For Petitioners:**       Robert C. Ekstrand  
                              Ekstrand & Ekstrand LLP  
                              811 Ninth St.  
                              Durham, North Carolina 27705

**For Respondent:**       Kenneth A. Soo  
                              Christine Scheef  
                              Tharrington Smith, L.L.P.  
                              209 Fayetteville Street  
                              Post Office Box 1151  
                              Raleigh, North Carolina 27602-1151

**WITNESSES**

**For Petitioners:**       [Mother]  
                              [Father]  
                              [M.D.]  
                              [A.L.]  
                              [T.M.]  
                              Michael Powers, Ph.D.

[D.R.]  
[A.R.]  
[T.V.], M.S.  
[C.W.]

**For Respondent:** [M.B.]  
[K.D.]  
[L.D.]  
[M.D.F.]  
[K.G.]  
[M.J.]  
[B.L.]  
Patsy Pierce, Ph.D.  
Victoria Shea, Ph.D.  
[T.W.]

### **ISSUES**

1. Did the Respondent school system fail to provide [Student] an appropriate IEP per 20 U.S.C. § 1414(d), 34 C.F.R. § 300.320 in the 2008-2009 school year including necessary educational and related services from March 30, 2009 till the end of the IEP period and thus procedurally and/or substantively deny [Student] a free appropriate public education?
2. Did the Respondent school system fail to effectively implement an appropriate IEP for [Student] that would enable her to make meaningful progress per 20 U.S.C. § 1414(d), 34 C.F.R. § 300.320 from March 30, 2009 until the end of the 2008-09 IEP period, and thus procedurally and/or substantively deny [Student] a free appropriate public education?
3. Did the Respondent school system fail to provide [Student] an appropriate IEP per 20 U.S.C. § 1414(d), 34 C.F.R. § 300.320 during the 2009-2010 IEP period including necessary educational and related services and thus procedurally and/or substantively deny [Student] a free appropriate public education?
4. Did the Respondent school system fail to effectively implement an appropriate IEP for [Student] that would enable her to make meaningful progress per 20 U.S.C. § 1414(d), 34 C.F.R. § 300.320 during the 2009-2010 IEP period, and thus procedurally and/or substantively deny [Student] a free appropriate public education?
5. Did the Respondent school system fail to provide [Student] an appropriate IEP per 20 U.S.C. § 1414(d), 34 C.F.R. § 300.320 during the 2010-2011 IEP period including necessary educational and related services and thus procedurally and/or substantively deny [Student] a free appropriate public education?
6. During any of the school years in this matter, did the Respondent school system fail to provide [Student] with an appropriate placement pursuant to 20 U.S.C. § 1412(a)(5), 34

C.F.R. § 300.115 and thus procedurally and/or substantively deny [Student] a free appropriate public education? If so, was the private educational program Petitioners chose for [Student] appropriate?

7. During any of the applicable school years in this matter, did the Respondent school system fail to appropriately consider extended school year services.
8. During any of the school years in this matter, did the Respondent school system fail to appropriately monitor and report [Student's] progress on her IEP goals per 20 U.S.C. § 1414(d)(1)(A) and thus procedurally and/or substantively deny [Student] a free appropriate public education?
9. During any of the school years in this matter, did the Respondent school system fail to appropriately evaluate [Student] and thus procedurally and/or substantively deny [Student] a free appropriate public education?

### **ADMITTED EXHIBITS**

#### **For Petitioners:**

Exhibit Number	Date Admitted -2011	Transcript Volume Number
1	3/1	14
2	3/1	14
3	1/5	1
4	3/1	14
5	1/5	1
6	1/6	2
7	1/5	1
8-18	3/1	14
19	1/13	5
20-24	3/1	14
25	1/5	1
26-31	3/1	14
34A	3/1	14
35-40	3/1	14
41 as redacted	3/1	14
42-49	3/1	14
50-54	1/5	1
55-57	3/1	14
58	1/5	1
59	3/1	14
60	3/1	14
62 as redacted	3/1	14
63-94	3/1	14

95	1/13	5
97-99	3/1	14
103	3/1	14
105	3/1	14
106	3/1	14
108	3/1	14
109	3/1	14
111	3/1	14
113-118	3/1	14
122	3/1	14
125-137	3/1	14
145	3/1	14
165-178	3/1	14
183	3/1	14
184	3/1	14
188A	3/1	14
189-193	3/1	14
197-199	3/1	14
200-216	3/1	14
218-226	3/1	14
233	1/13	5
241-245	3/1	14
247	3/1	14
248	1/13	5
250	3/1	14
251	3/1	14
252	1/13	5
255	1/13	5
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264	3/1	14
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342-344	3/1	14
350	3/1	14
360	3/1	14
362	3/1	14
364	3/1	14
364A	3/1	14
364B	3/1	14
365-369	3/1	14
374	3/1	14
376	3/1	14
377A	3/1	14
377B	3/1	14
385	3/1	14
386	3/1	14
389-391	3/1	14
394	3/1	14
396-400	3/1	14
402	3/1	14
405-407	3/1	14
500	1/5	1
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504	3/1	14
505	3/1	14
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609-621	3/1	14
623-625	3/1	14
627-630	3/1	14
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714-724	3/1	14
726-728	3/1	14
732	3/1	14
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737	3/1	14

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760	3/1	14
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769-779	3/1	14
781	3/1	14
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786	3/1	14
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799-801	3/1	14
804	3/1	14
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859-862	3/1	14
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869	3/1	14
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876-878	3/1	14
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890	3/1	14

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925	3/1	14
926	3/1	14
928	3/1	14
935-937	3/1	14
940	3/1	14
941	3/1	14
943	3/1	14
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983-985	3/1	14
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994	3/1	14
999	3/1	14
1000-1002	3/1	14
1004	3/1	14
1007-1009	3/1	14
1011	3/1	14
1018	3/1	14
1019	3/1	14
1023	3/1	14
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1042	3/1	14

1046	3/1	14
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1063	3/1	14
1065	3/1	14
1067-1069	3/1	14
1071-1074	3/1	14
1076-1079	3/1	14
1083-1085	3/1	14
1087	3/1	14
1090	3/1	14
1107	3/1	14
1116	3/1	14
1117	3/1	14
1121	3/1	14
1125	3/1	14
1128	3/1	14
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1140	3/1	14
1142	3/1	14
1143	3/1	14
1149	3/1	14
1150	3/1	14
1151	3/1	14
1153-1155	3/1	14
1157	3/1	14
1161	3/1	14
1164	3/1	14
1166	3/1	14
1168	3/1	14
1172	3/1	14
1174	3/1	14
1176	3/1	14
1177	3/1	14
1179-1183	3/1	14
1187	3/1	14
1188	3/1	14
1191	3/1	14
1193	3/1	14
1196-1198	3/1	14
1271	3/1	14



1273	3/1	14
1274	3/1	14
1276-1280	3/1	14
1283	3/1	14
1285-1296	3/1	14
Audio 1	3/1	14
Audio 2	3/1	14
Audio 3	3/1	14
Video 1	3/1	14

**For Respondent:**

Exhibit Number	Date Admitted -2011	Transcript Volume Number
1	3/1	14
2	3/1	14
4-25	3/1	14
28	3/1	14
30	3/1	14
32	3/1	14
34	3/1	14
36	3/1	14
38-56	3/1	14
61	3/1	14
62	3/1	14
88	3/1	14
91	3/1	14
96	3/1	14
98	3/1	14
111	3/1	14
126-135	3/1	14
138	3/1	14
144	3/1	14
147	3/1	14
148	3/1	14
150	3/1	14
153-158	3/1	14
164-167	3/1	14
171	3/1	14
174-177	3/1	14
179-183	3/1	14
185	3/1	14
186	3/1	14
188	3/1	14
189	3/1	14

## **PRILIMINARY MATTERS**

In a September 9, 2011 Final Decision, Order of Partial Dismissal, all claims set forth in this case occurring prior to, on or about March 30, 2009 were barred by the statute of limitations as the greater weight of the evidence presented showed that the parents knew or should have known about the actions of Respondent prior to, on or about March 30, 2009 that formed part of the basis of their complaint. Further, the preponderance of the evidence supported the conclusion that neither of the two exceptions that would override the one year restriction in this case was applicable.

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at this hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making these findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witnesses, any interest, bias or prejudice the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

## **FINDINGS OF FACT**

1. The minor petitioner [Student] was born in XX 2005 in XXX. Petitioners moved to North Carolina from XXX in 2007, before [Student] turned two-years-old. [Student] is today a six year old girl with a primary diagnosis of autism. She lives in Chapel Hill, North Carolina with her mother, [Mother], her father, [Father], and her brother, [Brother]
2. Respondent Chapel Hill-Carrboro City Schools Board of Education is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, (IDEA) and was responsible for providing special education to [Student] pursuant to Article 9, Chapter 115C of the North Carolina General Statutes.
3. [Student] was born after a normal, 38 week pregnancy. There were no complications in the delivery. However, within twenty-four hours after her delivery, [Student] was found in the hospital nursery in apparent respiratory distress. She was transferred to the Neonatal Intensive Care Unit (NICU). There, continuous positive airway pressure (CPAP) was placed to ensure continuous respiratory functioning, and she was monitored for ten days.
4. Soon after [Student]'s discharge from the NICU, [Student]'s parents began to identify several areas of concern including difficulty nursing, a high-pitched cry, and failure to engage with people. [Student] struggled with feeding from a bottle because she had difficulty creating a functional seal on a bottle. Later, when her parents began

introducing solid foods, [Student] showed an aversion to particular textures. As a result, they reduced all solid foods to purees, until they could successfully initiate a slow transition to solid foods beginning at 12 months.

5. Very early on, [Student] exhibited sensitivity to sensory stimulation and as a result developed sensory defensiveness including holding her body in a rigid position. It was difficult to calm or soothe [Student] when she appeared upset or in distress, in the typical ways.
6. [Student] experienced delays in meeting the fundamental gross motor milestones (*i.e.* sitting, crawling, standing, and walking). [Student] could not sit (without falling over) before she was nearly a year old; crawling was also delayed, as was her ability to stand and to walk.
7. When [Student] was approximately six months old, her parents sought the assistance of an occupational therapist. According to [Mother], the occupational therapist determined that [Student] had motor planning and sensory integration dysfunctions.
8. [Student] began occupational therapy in the clinical setting as well as at home. After the therapy began, [Student] slowly learned to feed herself, pick up toys, sit on her own with support, and eventually crawl and walk.
9. [Student] did not acquire foundational gross motor skills naturally. She began to acquire those skills after direct, one-to-one, and often “hand-over-hand” instruction targeting the component skills required to perform the larger milestone skill. Much of this early intensive instruction was delivered by [Student]’s mother.
10. [Student] was not able to learn many skills by imitation. Rather, for [Student] to acquire those skills required [Mother] to manipulate and position [Student]’s body through the sequence of movements involved. [Student] was highly sensitive to abrupt changes in light, sounds, and touch. Before [Mother] could teach [Student] fundamental motor functions, she first had to reduce [Student]’s sensory defensiveness (which was generalized over [Student]’s entire body) so that [Student] could tolerate the sensory stimulation involved in performing the various motor functions.
11. [Student] was also delayed in reaching developmental milestones for acquiring social interaction and communication skills. This was a feature of [Student]’s motor planning dysfunction, appearing as delays in the acquisition of “oral motor planning” skills. [Student] did not naturally acquire the oral motor planning and sequencing skills necessary to shape her mouth, jaw, and tongue and coordinate those movements with the breathing and vocalization functions necessary to produce basic speech sounds.
12. [Student]’s parents obtained genetic testing for [Student] in June of 2006. Preliminary evaluations suggested that [Student]’s genetic testing should focus on two genetic disorders in particular, Cornelia de Lange Syndrome (CdLS) and Rett Syndrome. Genetic tests were conducted to determine whether [Student] was expressing genetic markers for those genetic disorders as well as Fragile X, mitochondrial mutations, and Angelmann Syndrome, among others.

13. The results of those genetic tests were negative. To be certain, Petitioners also obtained a multi-system examination and evaluation from Dr. Vandana Shashi, in the summer of 2010 and additional genetic testing. Dr. Shashi is a geneticist and associate professor of pediatrics at Duke University Medical Center. Dr. Shashi confirmed that, clinically, there was no evidence that [Student] suffers from CdLS, and ruled out CdLS as a plausible diagnosis.
14. [Student] and her family moved to North Carolina in March 2007. At that time, according to [Mother], [Student] was not making any sounds and was nonverbal.
15. Prior to preschool, [Student]'s parents referred [Student] for evaluation to determine whether she was eligible for an Individualized Family Service Plan (IFSP) from North Carolina's Infant-Toddler Program. [Student] was determined to be eligible, and an IFSP was in place for [Student] until she turned three.
16. [Student]'s IFSP shows that assessments in speech and language, social, emotional, occupational therapy, and physical therapy identified significant needs requiring early intervention services in all of the tested domains. [Student]'s IFSP prescribed occupational therapy twice weekly, speech and language therapy three times weekly, physical therapy once a week, and treatment provided by a developmental therapist once a week.
17. After moving to North Carolina, [Mother] began looking for a preschool for [Student]. She contacted [R.M.], then the special services coordinator for Frank Porter Graham Child Development Center (FPG), and visited the center and a classroom. In an email dated January 11, 2008, after her visit, [Mother] stated that her visit solidified her decision that Frank Porter Graham was where [Student] would get the best attention and education.
18. The Frank Porter Graham Child Development Institute, of which the Child Development Center is a part, was founded in the early 1950s. The current director of the Frank Porter Graham Child Development Institute, Dr. Sam Odom, is an expert in the field of autism and studying how children with autism can develop friendships and how they can learn to communicate effectively.
19. In 1984, FPG admitted eight children with disabilities to the child care program, and the center began studying the effect of offering inclusive services for children with disabilities. Inclusive services educate children with disabilities in classrooms with their typically developing peers, and there is research supporting its benefits for children with disabilities. The purpose of inclusive services is to begin incorporating children with disabilities at an early age into the types of settings they will encounter in society. The goal is also to allow a child to have as typical a childhood as possible.
20. Related services at FPG are provided in an integrated model, in which therapists join kids in the classroom routines and support children's learning specific skills in that context. Physical therapists often work with students on the playground or during motor activities; and occupational and speech therapists often work with students in

play or small group settings. Therapists may also pull children to another part of the classroom to work on a skill, most often with typically developing peers joining in.

21. On April 30, 2007, an Augmentative Communication Evaluation of [Student] was conducted by [K.C.], M.A. CCC-SLP, through the North Carolina Department of Health and Human Services (NC DHHS). The report of that evaluation, dated May 3, 2007, was provided to FPG and Respondent for use in the development of [Student]'s IEP. [K.C.] noted that [Student] "vocalizes often although with limited sounds and uses the words "mama," "dada," and "Ayduh" for her brother; [Student] uses some initial sounds appropriately in imitation of words (e.g., "k" for keys, "f" and "sh") [and] the sign for 'more' ... and uses her voice to gain attention followed by vocalizing at a person or gestures." (P Ex. 8.) [K.C.] observed that [Student]'s motor planning and sequencing deficits impeded her natural acquisition of adaptive speech.
22. In June of 2007, [Student] began to receive physical therapy services from Dr. Susan Attermeir, PhD, PT. In August of 2007, [Student] began to receive occupational therapy and speech therapy from private providers employed by her parents. [Student] received occupational therapy from [A.L.], O/TRL, and speech language therapy from [E.F.], M.Ed., CCC-SLP.
23. In November of 2007, when [Student] was two years old, her parents obtained a neurodevelopment evaluation. The evaluation was conducted by Dr. Timothy Hall, M.D. Dr. Hall diagnosed [Student] as having developmental delays across several domains and language disorders. Dr. Hall recommended that [Student] maintain the then-current level of services through private therapists; that [Student] be enrolled in a therapeutic preschool program when she turned three years old; and that [Student]'s therapists continue to focus on skills that would assist [Student] in making the transition to a therapeutic preschool program.
24. In February of 2008, [Student] was offered enrollment in FPG, and began attending soon thereafter in preparation for her transition to a therapeutic preschool program when she became eligible for one on her third birthday under IDEA.
25. [A.L.] is a licensed occupational therapist who operates her own clinic in Durham, N.C. [A.L.] has worked with [Student] since 2007, when [Student] first moved to North Carolina, and she currently sees [Student] once a week for 50 to 60 minutes.
26. [A.L.] began working with [Student] in August 2007. In February 2008, she wrote a report about [Student]. [A.L.] noted that [Student] had "significant challenges with sensory defensiveness, and physical motor challenges have contributed to missed opportunities for her to explore, interact and learn from people and objects in the environment around her." (P. Ex. 165) She stated that [Student] was less dominated by "fight-flight-fright" patterns than she had been six months earlier. According to [A.L.], [Student] was able to make requests using signs as early as February 2008. Her February 2008 report also indicated that [Student] was laughing and smiling during some of her therapy activities. The report indicated that [Student] "frequently makes eye contact and uses gestures, signs, utterances, and head movements to communicate what she wants and does not want." (T. Vol. 6, 1075:13-1080:1, R. Ex. 7A). [A.L.]

noted that, without adult prompting and direction in therapy, [Student]’s sensory and emotional modulation would result in [Student]’s “wandering aimlessly” while “crying [or] whining,” and “interfered with her ability to interact with others and explore and learn from the environment around her.” [A.L.] recommended that [Student]’s “challenges sequencing and executing the steps” should “be more and more of a focus of occupational therapy as [Student]’s challenges with sensory modulation continue to improve.”

27. [Student] began attending FPG in [Spring] 2008. Prior to her enrollment, [Mother] and [Father] completed a number of forms, including the FPG Child Care Admissions Therapy Services Agreement. Among other things, the Agreement stated that therapy services would be provided in the context of classroom or playground and that intervention is ongoing every day through the interventions provided by the teachers and her therapists.
28. In March 5, 2008, Petitioners presented [Student] to the Center for Children with Special Needs (CCSN) for a comprehensive psycho-educational evaluation to be conducted by Dr. Michael Powers and Dr. Michael Palmieri. This was the first of three annual psycho-educational evaluations conducted by CCSN. At the conclusion of the evaluation, Dr. Powers and Dr. Palmieri diagnosed [Student] with Pervasive Developmental Disorder—Not Otherwise Specified (PDD-NOS). On April 8, 2008, Dr. Powers and Dr. Palmieri issued a 14-page report of their psycho educational evaluation.
29. Michael Powers is the founder and director of the Center for Children with Special Needs in Glastonbury, Connecticut. At the hearing, Dr. Powers described CCSN as an “interdisciplinary clinic for the evaluation and treatment of children with autism spectrum disorders and other neuro-developmental disabilities.” (T. Vol. 2, 185:7-11).
30. Dr. Powers is a certified special education teacher and school psychologist. He also has a doctorate in Psychology. Dr. Powers was accepted as an expert in evaluating children with autism.
31. The evaluation conducted at CCSN in 2008 included the Mullen Scales of Early Learning, a developmental assessment; the Vineland Adaptive Behavior Scales, for which [Mother] was the informant; and the Autism Diagnostic and Observation Schedules (ADOS). [Student] also had a play-based assessment.
32. Dr. Powers acknowledged that in 2008 he had received from FPG a School Intake Form, along with an attachment providing additional information. The Intake Form noted a number of [Student]’s strengths and weakness in the classroom.
33. When he saw [Student] in March 2008, she “had no instructional control,” which Dr. Powers defined as “the ability to sit to learn.” (T. Vol. 2 196:25-197:1) In addition, “her language was extraordinarily limited,” and she was “absent the ability to learn from modeling and . . . imitation of other people.” (T. Vol. 2 198:7-9; 198:24-25) Dr. Powers testified that typical children who are 2 years, 8 months old, as [Student] was when she was first evaluated at CCSN, learn by imitating. [Student] also did not have

appropriate play skills and demonstrated gross motor issues, including a disabled gait and poor balance.

34. In March 2008, [Student] exhibited behavior common to children with autism, such as focusing on items that were not relevant to the social situation. According to Dr. Powers, autism is a “social learning disability.” (T. Vol. 2, 198:6).
35. Dr. Powers testified that [Student] needed to be taught what he termed early learner skills, such as sitting and attending to tasks. There are two components to teaching a child a skill: whether the child can acquire the skill and whether the child can then generalize the skill across settings. Dr. Powers testified that there should always be a concern with how a child is generalizing skills to the natural environment and to other kids.
36. According to Dr. Powers, [Student]’s language limitations put her at risk for losing access to typical peers, because she would not be able to communicate with them. He stated that “articulation difficulties,” such as the ones [Student] displayed, can lead to a loss of “social teaching” through peers and the development of “dysfunctional” communication strategies. (T. Vol. 2 202:1-2; 13-14; 21) It creates not just an immediate risk, but a risk for developing certain “behavioral patterns.” (T. Vol. 2 203:11-12) He noted that it is important to teach kids with autism how to do things “the right way before they learn the wrong way” because wrong behaviors “are awfully hard to unteach.” (T. Vol. 2 203:17-18; 15-16)
37. Dr. Powers testified that “any child with a developmental disability is at risk to the extent that the instructional program for them does not effectively and affirmatively intervene to produce measurable gain.” (T. Vol. 2 201:19-22)
38. Dr. Powers and Dr. Palmieri made several recommendations including but not limited to: 25 to 30 hours per week of direct, intensive instruction in the areas of [Student]’s educational needs identified in their report; social skill instruction to include an emphasis on the development of functional routines and reciprocal play behaviors to support transitions and respond to peers; speech and language interventions to be embedded throughout the daily program with direct one on one therapy (for speech) of at least 1 hour per day; and several hours each week devoted to direct occupational therapy and physical therapy.
39. In the 2008 evaluation, Dr. Powers and his colleague acknowledged that [Student] would be attending FPG and stated that it could be an appropriate placement for [Student]
40. While an Early Learning Composite can be calculated on the Mullen, the 2008 evaluation did not include such a score. Dr. Victoria Shea, a witness for the Respondent who was qualified in the area of evaluation and treatment of autism spectrum disorders, calculated the Early Learning Composite for the 2008 administration of the Mullen.
41. One standard score reported in the 2008 evaluation was not, according to the test manual, accurate. According to Dr. Shea, [Student]’s standard score on the receptive

language subtest was reported to be 36, but at [Student]'s age on that particular scale, a test subject cannot get a standard score of 36. Either a 35 or a 38 would have been a valid score; however, 36 was not a valid score. Because that was the reported score, Dr. Shea calculated the composite score using the 36. The Early Learning Composite score in the 2008 evaluation would have been a 62. The average score on the Mullen is 100, so a 62 is 2 ½ standard deviations below the mean.

42. When Dr. Powers evaluated [Student] in March 2008, her IEP had not yet been drafted.
43. When they received the evaluation from CCSN, [Mother] and [Father] shared it with the team at FPG, which had initiated the planning process for developing [Student]'s first Individualized Education Program (IEP). The evaluation included a diagnosis of Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS) and reported that [Student] had recently undergone genetic testing to rule out Cornelia de Lange Syndrome.
44. On March 21, 2008, [Student]'s private speech language pathologist, [E.F.], M.Ed., CCC-SLP, administered a speech-language evaluation of [Student]. Petitioners provided the report of [E.F.]' evaluation to FPG and Respondent to inform them of [Student]'s educational needs in that area. [E.F.] conducted several standardized tests, including the Receptive-Expressive Emergent Language to test-three (REEL-3) and the Rossetti Infant-Toddler Language Scale. The results she obtained from the REEL-3 and Rossetti tests showed that [Student] "has a significant discrepancy between what she understands" and what she is able to express. (P. Ex. 11) Due to [Student]'s inability to name or imitate words, [E.F.] was not able to complete an articulation assessment.
45. Based upon the results of her evaluation and her prior work with [Student] in private speech language therapy, [E.F.] recommended intensive therapy to develop her speech and language skills. [E.F.] recommended that [Student]'s educational program target articulation skills that would require her to "combine more complex sounds in sequences, and to begin using her expressive language for a variety of communicative functions." (P. Ex. 11)
46. On May 23 and 28, 2008, Maria Lopez-Boysen, Ph.D., Respondent's school psychologist, conducted a psychological evaluation of [Student]. Respondent's school psychologist, Ms. Lopez-Boysen, adopted CCSN's score of "36" on the Receptive Language portion of the Mullens' evaluation.
47. Respondent's school psychologist adopted the results of the tests conducted by CCSN as detailed in the report of CCSN's 2008 Psychological Evaluations, including CCSN's conclusion that [Student]'s symptoms were consistent with an Autism Spectrum Disorder.
48. Respondent's school psychologist noted that [Student]'s FPG classroom teacher reported that [Student] "uses signs to communicate, is pretty independent in the classroom and entertains herself," "does not interact with peers," "communicates through some signs but has very little language but often does not 'listen' or follow directions," "does not like circle time but stays on the teacher's lap," and "stay[s] on



task for an age appropriate amount of time... if she enjoys activity (average amount of time on-task is 5-7 minutes),” to name a some of the observations. (P. Ex. 14)

49. On May 28, 2008, Ms. Lopez-Boysen observed [Student] for about 45 minutes during a free play time in her FPG classroom and later in FPG’s “motor play room.” Some of the observations Ms. Lopez-Boysen made and recorded in Petitioners’ Exhibit 14 include:
  - a. In the classroom, [Student] appeared to enjoy looking at herself in the mirror (frequently smiled and laughed as she watch in the mirror) (*id.* at 3);
  - b. Frequently heard [Student] to both say and sign “mama,” both when happy and when upset (*id.* at 3);
  - c. Observed [Student] to use several other signs to communicate things she saw and even her feelings (e.g., signed for “cry” when she became upset after several peers knocked some blocks down) (*id.* at 3);
  - d. Occasionally watch[ed] [peers] as they played [and] was able to point to different friends after teacher named them for her (thus demonstrated understanding their names) (*id.* at 3);
  - e. [Student] demonstrated beginning pretend play skills (held toys phone to ear; put purse over shoulder and looked at self in mirror, put plastic food on plate and pretended to eat) (*id.* at 3);
  - f. Allowed teacher to guide her actions or help her with activities, even when she cried and did not seem to want to complete activities (*id.* at 3);
  - g. Appeared to have a nice bond and be comforted by teachers and therapists at school. Approached them and climbed onto their laps when [she] felt upset (*id.* at 3);
  - h. [Student] demonstrated “limited verbalizations” (*id.* at 3);
  - i. [Student] engaged in “no initiation of peer interactions ... when a friend approached her and gently hugged her, [Student] pushed her away and whined to her teacher” (*id.* at 3);
  - j. [Student] engaged in “repetitive play behaviors” (*id.* at 3);
  - k. [Student] “became increasingly upset as the action level of other students in the motor play room increased” (*id.* at 3) and
  - l. [Student] “did not attend to short story being read to her in the motor play room” (*id.* at 4.)
50. Ms. Lopez-Boysen made a number of recommendations relevant to [Student]’s educational program, finding that the IEP team should review all relevant information to determine how to best meet [Student]’s needs in the least restrictive educational environment, and that [Student] would benefit from participation in a structured learning environment where she has opportunities to learn and practice social behaviors,

learn basic readiness skills, and to develop phonemic awareness, and form basic language concepts.

51. On May 27, 2008, an occupational therapist employed by Respondent observed [Student] in her FPG classroom for purposes of advising [Student]’s IEP team on [Student]’s educational needs relating to her fine motor and gross motor skills. [P.V.] found that overall [Student] appeared to have low tone and fall into gravity often during play activities. She was aware of peers but did not interact with them and was hyper-aware when another child in the class would cry or yell.
52. Based on her observations and the results of the report of Petitioners’ private occupational therapy evaluation conducted by [A.L.], O/TRL, [P.V.] recommended that [Student]’s educational program include strengthening activities relating to her hand and arm strength, heavy work throughout the day in order to be more aware of where her body is in space, sensory intervention in order to respond to her environment more proficiently; and movement experiences that increase her proprioception and kinesthetic awareness in order to improve her ability to safely navigate her environment.
53. On May 1, 2008, [M.M.], PT, a physical therapist employed by FPG, conducted a physical therapy evaluation of [Student] to determine her educational needs. She found that in light of [Student]’s delays and the difficulties she observed [Student] having in the FPG classroom and otherwise navigating her environment, [Student] should receive direct and consultative physical therapy on a weekly basis.
54. On or about May 28, 2008, the Frank Porter Graham School produced a document entitled “Occupational Therapy Evaluation,” with “Dates of Evaluation” designated as May 22 and May 28, 2008, and “Evaluator” designated as Teresa B. Jones, MS, OTR/L and Melissa Lee, OTS. This was a summary of one of Petitioners’ privately obtained evaluations and a summary of Jones’ and Lee’s observations of [Student] in her FPG classroom. Jones and Lee concluded and recommended that [Student] would need a combination of direct occupational therapy services and classroom consultative OT services to work on active participation in classroom routines, self-care routines, participating in circle time and engagement in a variety of pretend play with peers and adults.
55. [K.D.] is a licensed speech therapist who worked with [Student] at FPG during the 2008-09 school year. [K.D.] has bachelor’s and master’s degrees in speech/language pathology and has worked as a speech therapist since 1978. She has had experience working with children with autism since the early 1980s. As of the date of [K.D.]’s testimony, she was also working for [##], although she had just submitted her resignation.
56. In an email exchange, [K.D.] described how services are provided at FPG. [K.D.] explained that she would need to have time with [Student] during a variety of daily routines and that the American Speech and Hearing Association recommends no more than 30-minute sessions with children [Student]’s age. [K.D.] also explained that when

she worked with [Student], other children would be present in the environment and often in the play.

57. On June 4, 2008, [Student]'s IEP team convened to discuss the role that occupational therapy and physical therapy would have in [Student]'s 2008 IEP. On June 6, 2008, [Student]'s IEP team was convened to discuss [Student]'s eligibility under IDEA.
58. Because Petitioners did not agree with the initial recommendations for service levels made by FPG related service providers, [Mother] created a PowerPoint presentation to chart the various recommendations Petitioners had received regarding [Student]'s related services. [Student]'s related services were ultimately increased from the initial recommendations.
59. [Student] was found eligible for special education services in early June 2008 under the category of Developmental Delay (DD), which is available until a child turns 8 years of age. [Student]'s IEP was finalized in late June 2008. Among the parent concerns listed on the June 2008 IEP were peer relationships and the desire for [Student] to socialize with other kids.
60. [Student]'s 2008-09 IEP provided for placement at FPG 20 hours per week, with 45 sessions of speech language therapy during the nine-week grading period. In addition, [Student] was to receive 4.5 hours per month of occupational therapy and 3 hours per month of physical therapy. [Student]'s IEP included a note that related services would be provided in an embedded inclusive model.
61. Petitioners objected to the level of services offered and the lack of definition in the specially designed instruction it proposed. They believed Respondent's educational program failed to address [Student]'s educational needs (as identified with particularity in the CCSN Evaluation Report) and was unlikely to produce meaningful progress or educational benefits. Petitioners also objected to the absence of any prescribed ABA, VBA and ABLSS-R methodologies and curriculum in the IEP.
62. Dr. Powers testified that [Student]'s 2008-09 IEP included instructional objectives "pulled from the Carolina curriculum," which is one of curricula referenced in the 2008 CCSN evaluation as being appropriate for [Student]. Dr. Powers testified that the Carolina curriculum "would be a very good foundation. It's a really strong developmental curriculum." (T. Vol. 2, 219:15-20).
63. Dr. Powers stated that [Student] needed to be in "a full day program" with "individualized direct instruction" that would continue year round. (T. Vol. 2 218:23; 219:5). He emphasized the importance of reducing distracters in the environment because [Student] had trouble paying attention to more than one thing at a time. He stated that, if the environment has "noise, people, and all kinds of stuff going on . . . she will be distracted from the binary nature of her instruction." (T. Vol. 2 232:20-24)
64. In August 2008, [Mother] emailed the staff at FPG describing changes that she observed in [Student], including more vocalization, singing sounds, and more communicative intent. [Mother] wrote that [Student] was beginning to recite letters of the alphabet and

was asking for things using two signs. [Mother] also wrote that [Student] was eating well with a spoon and beginning to use a fork and engaging with her brother more.

65. During the 2008-09 school year, [Mother] received reports of [Student]’s speech language sessions, as well as email updates from [Student]’s occupational therapist and physical therapist.
66. The FPG staff met twice monthly to discuss each child with a disability in [Student]’s classroom. [Mother] attended some of these meetings, during which 15 minutes was devoted to each child. [Mother] testified that she was concerned with taking too much time during the meetings.
67. Because Petitioner’s believed [Student]’s 2008-09 IEP did not address [Student]’s need to develop the necessary oral motor planning, functioning, and sequencing skills, Petitioners sought the help of private specialists. In a prior ruling, the Undersigned dismissed all claims occurring prior to March 29, 2009 as time-barred.
68. On January 6, 2009, Petitioners obtained a private speech language evaluation from [T.V.]. [T.V.] is a licensed speech language pathologist and the co-founder of the [##] clinic. [T.V.] was qualified as an expert in teaching children with autism in the domains of speech, language, articulation, behavioral and social skills. When [T.V.] first observed [Student], her “impressions were that she had very little of the early learning skills in place, in other words the ability to learn . . . . She had trouble attending for periods of time and she had trouble playing.” (T. Vol. 1 70:25-71:6)
69. [T.V.] emphasized that it was important for children like [Student] that “[their] first experiences with other children are positive ones.” (T. Vol. 1 121:20-22) She stated that, if those experiences are not positive, you “hav[e] to dig yourself out from them thinking that it’s not fun to be around other kids.” (T. Vol. 125:20-21) [T.V.] never observed [Student] at FPG in-person
70. [T.V.]’s report of her initial evaluation and recommendations includes a referral to [T.M.] for further assessment of suspected apraxia of speech. [T.M.] is a licensed speech language therapist and the co-founder of [##]. She has worked as a speech language therapist in various capacities since 1981 and has worked with [Student] since January 2009.
71. [Mother] testified that when she began taking [Student] to [##] that “[Student] didn’t have the correct type of breathing to make the sounds” required to communicate verbally. (T. Vol. 3, 434:2-5). [Mother] also testified that [Student] was not making any vowel sounds prior to attending [##]. In her August 2008 email to FPG staff, [Mother] wrote that [Student] could “recite most of the alphabet with either the letter name or the sound.” (R. Ex. 173).
72. [T.V.] and [T.M.] testified [Student] could not deliberately or adaptively produce the component sounds of speech in January of 2009. [T.V.] stated that at the time she met [Student], “she was not yet able to produce speech in a way that [was] intelligible.” (T. Vol. 1 80:1-2) Furthermore, [Student] exhibited signs of frustration. [T.V.] stated that

this is “an indication that an indirect approach has been tried and is leading to frustration because you’re asking the child to do something [the child is] not ready for yet.” (T. Vol. 1 77:8-11) [T.M.] testified that when [Student] became frustrated she would “shut down,” “cry,” and “look away.” (T. Vol. 4 690:10-12)

73. [T.M.] testified when she first met [Student] in January 2009 she was non-verbal and did not imitate. [T.M.] acknowledged that [Student] could perform differently with other individuals in different circumstances, and she did not speak with anyone at FPG about how [Student] was functioning there. A progress note from FPG dated January 23, 2009, shortly after [T.M.] meet [Student], indicated that she was using a number of different words and sounds, including “Mama,” “Dada,” “bye,” “mm,” “pah,” “tah,” and “ah.” (R. Ex. 22).
74. As [T.V.] and [T.M.] explained, by reason of [Student]’s motor planning, functioning, and sequencing dysfunction, she could not naturally acquire the oral motor planning, functioning, and sequencing skills necessary to shape her mouth, jaw, and tongue and coordinate their movements with her respiratory and vocalization functions to deliberately produce the basic speech sounds.
75. Based on [T.V.]’s consultation report and her own evaluation of [Student], [T.M.] initiated specially designed speech-language therapy targeting [Student]’s need to develop motor planning and sequencing skills beginning in January of 2009. [T.M.] testified that [Student] would not thrive in “an educational program that proposed to educate or teach [Student] speech without the kinds of intense one-to-one instruction that [she was] providing or something like it.” (T. Vol. 739:19-22) She stated that, in her opinion, “you’ve got to have that intense drill,” with “your hands on her mouth to manipulate,” and “it can’t occur on an indirect basis.” (T. Vol. 740:4-6; 9)
76. [Student] began to acquire the skills required to produce discrete speech sounds and then to combine those sounds into words, and then to combine those words into phrases, and then to develop the capacity to imitate sounds and combinations of sounds used by others (i.e. words and phrases), and to adaptively use and generalize the use of those words. Petitioners assert this came about only as a result of private therapies. Respondent asserts that FPG’s program for [Student] appropriately targeted those skills.
77. In a speech language therapy final report (Final Progress Report for the period of January 2009 through April 2009 written by FPG intern [J.S.] for [K.D.]’s signature) of [Student]’s speech-language program at the end of the 2008-09 IEP Year, [J.S.], an Intern, explained that [Student]’s acquisition of the skills necessary to deliberately produce and imitate speech sounds seemed to appear without any identifiable cause. The report states, “About halfway during the semester, [Student] began imitating gestures, sounds, and words more frequently as well as using spontaneous speech to request and protest. It seemed like one day it was almost taxing to get [Student] to imitate anything, and the next day she was full of language and imitation. She now uses her language to request food during meals (e.g. “more bread”), inform her teachers (e.g. “uh-oh spill milk”; “all done eat”), and even protest (e.g., “no sit”). She can use her communication skills for a variety of intents, and although not always intelligible without context, [Student]’s language skills have expanded greatly this semester.” (P.

Ex. 104). Petitioners assert this was the result of private therapies. Respondent asserts that this was the result of the work done at FPG at least to a showing of an appropriate education.

78. [B.L.] is a licensed physical therapist who worked with [Student] at FPG from September 2008 until she withdrew in March 2010. As a physical therapist, [B.L.] focuses on gross motor skills, which typically address mobility, such as crawling, walking, running, hopping, or jumping.
79. [B.L.]’s recollections of [Student] when she first began working with her indicated that [Student] was just beginning to step up and down in small increments and that she could climb stairs with either one hand held or using the railing, although she preferred two-hand support. She indicated that [Student] was at risk of being knocked down by fast-moving peers.
80. [B.L.] recalled that in October 2008, [Student] was not confident in her balance and mobility and would struggle when around other students who moved more quickly. By February 2009, [B.L.] reported that [Student] was able to increase her speed of walking when she focused on the activity that she was walking towards. [B.L.] also observed [Student] exploring more of the playground area as she became more confident and more comfortable around her peers.
81. In a June 18, 2009, email to [Mother], [B.L.] provided information about [Student]’s progress on her gross motor IEP goals in her 2008-09 IEP, in which she reported that [Student] had allowed herself to be pushed on the tricycle and had even tried to pedal. The email also indicated that [Student] had been doing well on the wedge pillow in the motor room and was doing better jumping on the mattress in the room.
82. [K.D.], the FPG speech therapist, testified that during the 2008-09 school year, she worked with [Student] in various settings, including different routines in the classroom and also on the playground. [K.D.]’s experience working at FPG led her to believe that children make good progress when they are able to learn with other children, across the routines of the day.
83. [K.D.] testified that [Student]’s communication skills when she started working with [Student] were at the level at which she was working on more basic skills. For example, one of the core features of autism is difficulty with social reciprocity, including the ability to develop joint attention, or sharing attention with others in order to have a social interaction. [K.D.], in initially working with [Student], wanted her to understand that she was sharing attention with others.
84. In September 2008, [Mother] received an email from [K.D.], to which [Mother] responded by stating that she was happy with [Student]’s transition to a new classroom. [Mother] commented that the semester was going well and that [Student] was more open to engagement.
85. In December 2008, [K.D.] emailed [Mother] regarding her recent progress. In the email, [K.D.] states that [Student] is more verbal and vocalizing more. The email also

states that [K.D.] is working hand-over-hand with [Student] on certain skills. [K.D.] testified that [Student] was becoming more conversational and was beginning to understand having a common topic with another person.

86. [K.D.] used various strategies with [Student], including milieu language training; visual prompting for both expressive communication and to help with organization; augmentative communication; peer-mediated teaching; and touch cuing. She also routinely used behavioral approaches. [K.D.] believed [Student] made progress during the time period that [K.D.] worked with her, across the areas of speech, language, and communication, including improved articulation and social communication and language development. [Student] had less difficulty with proximity to peers and, with prompting, was interacting with them, although social interaction continued to be an area of need. [Student] progressed from removing herself from peer groups to being comfortable in settings with peers throughout the classroom.
87. In advance of quarterly review meetings, at which the team would discuss [Student]'s progress, [K.D.] would review [Student]'s goals and, if there was a goal on which she did not believe she had a sufficient amount of data, [K.D.] would work with [Student] to assess where she was on that goal.
88. [K.D.] did not write formal progress notes but would keep anecdotal notes for herself. Her practice was to shred those notes at the end of each school year. [K.D.] shredded her notes regarding [Student] in the summer of 2009, when she left FPG. [K.D.]'s interns, who were graduate students in speech pathology, made progress notes. [K.D.] testified that she was present for the sessions described in the notes. The progress notes do not reflect all of [K.D.]'s sessions because she did not write progress notes on her own.
89. Petitioners' private therapist, [T.M.], kept Therapy Notes which traced the path of [Student]'s acquisition of speech, beginning on January 4, 2009, and continuing to the time of the hearing. [T.M.]'s articulation instructions since January of 2009 were guided by four successive Treatment Plans. The first from January 14, 2009 through July 14, 2009; the second, from July 15, 2009 through January 14, 2010; the third, from January 15, 2010 through July 14, 2010; and the fourth, from July 15, 2010 through January 14, 2011.
90. At the end of the 2008-09 school year, Petitioners were concerned that many of [Student]'s goals might carry over. Beginning in May of 2009, Petitioners initiated discussions with [Student]'s IEP Team regarding options for modifying and improving [Student]'s educational program. In these discussions, Petitioners emphasized their concern that the failure to provide instruction to [Student] in a direct, one-to-one, intensive manner was placing [Student] at risk of being unable to access or benefit from the curriculum or socialization opportunities with peers at FPG, and even at risk for regression.
91. On May 20, 2009, [Student]'s IEP team convened to address [Mother]'s and [Father]'s concerns about [Student]'s failure to meet her IEP goals in the prior school year, [Student]'s overall lack of progress at FPG, the effects of the announced staffing

changes, and their emerging belief that [Student] was not deriving benefit from the peer socialization opportunities. In addition, Petitioners wanted to ensure that [Student]’s team understood the progress that [Student] had made in the prior five months which they believed was the result of working with [T.M.] at [##].

92. [T.W.], the school district’s preschool disabilities coordinator, testified that a goal being carried over did not mean that [Student] made no progress. Development of communication with peers was extremely difficult for [Student] and FPG was not surprised that [Student] would continue to have goals relating to interaction with peers.
93. In January 2009 [T.M.] diagnosed [Student] with apraxia of speech based on her clinical observation and independent opinion of [Student]. Apraxia of speech is a motor disorder that affects a child’s ability to form their mouth in such a way to produce sound.
94. Dr. Patsy Pierce, a witness for the Respondent, testified about the difficulty in diagnosing apraxia in young children, particularly in young children with developmental delays. Dr. Pierce is a licensed speech language pathologist. She has her bachelor’s and master’s degree in speech language pathology, and a doctorate in special education and literacy with a focus on early childhood. She holds a current birth to kindergarten teaching license. Dr. Pierce has worked as a speech language pathologist in a range of settings, including the public school system, mental health placements, and at a hospital school.
95. Dr. Pierce has extensive work with students with autism and has taught graduate-level courses in speech language pathology. Dr. Pierce had an academic appointment as an assistant clinical professor in speech and hearing sciences and taught courses on speech disorders and phonetics. Dr. Pierce was accepted as an expert in early language development, including written language for children with or without disabilities.
96. Dr. Pierce testified to the American Speech-Language-Hearing Association (ASHA) position statement on diagnosing childhood apraxia of speech. Dr. Pierce is familiar with the position statement because she used it in the graduate course that she taught on neuromotor speech disorders. According to ASHA, a diagnosis of childhood apraxia of speech as opposed to the more common phonological processing disorders is difficult to make in children with developmental or cognitive delays.
97. As children physically develop, their speech mechanisms, the actual length of their throat or the size of their tongue, the inner parts of their mouth, are all expanding and growing. In addition to the structural development, motor skills and motor memory are also developing. Because of the continued development, it’s often difficult to sort out speech problems. Another reason that it is difficult to diagnose apraxia is because of the tests that are currently available.
98. Dr. Pierce testified about a research paper titled “A Review of Standardized Tests of Nonverbal Oral and Speech Motor Performance in Children.” (P. Ex. 550). The paper was a review of the available standardized assessments for speech praxis and for oral speech mechanisms. According to the results, only six of the 22 tests that had been



identified for possible review by 2006 met the author's exclusionary and inclusionary criteria. Among the six were the Verbal Motor Processing Assessment for Children and the Kaufman. The Kaufman was administered to [Student] by [##] in 2010. Dr. Pierce taught graduate students the VMPAC, the Verbal Motor Processing Assessment for Children.

99. According to Table 2 in the research paper, the publishers of the Kaufman state, in the test manual, that it is appropriate for use with children ages 0 to 6 years for diagnosis and treatment planning. Table 2 in the research paper does not speak to what the study's authors found regarding the efficacy of the Kaufman. Table 3 in the research study shows the adequacy of methods of interpreting test performance, reliability, and validity for the six tests that they reviewed. (P. Ex. 550). The table uses check marks to indicate when there are comparisons to norms, and the VMPAC has several checkmarks. By contrast, the Kaufman did not get any checkmarks, and the table indicates that it "failed to meet operational definition for adequacy but some relevant information was provided." (T. Vol. 11, 1975:13-1976:5).
100. An evaluation of [Student] conducted by [##] in January 2010 indicated that [Student] has "speech difficulties due to a combination of weak oral musculature, motor planning difficulties, and a phonological process disorder." (P. Ex. 17).
101. According to Dr. Pierce it is difficult to differentiate between these different kinds of speech problems, especially in younger children and especially with those with language delays.
102. [Mother] emailed [Student]'s related service providers at FPG at the end of the 2008-09 school year to thank them for their "perseverance and commitment," which [Mother] believed had led to [Student] making progress. [Mother] also stated that [Student] had grown and developed a great deal and was continuing to flourish. (R. Ex. 185).
103. In May 2009, Petitioners suggested at a meeting with FPG staff that [Student]'s educational programming be split for the 2009-10 school year. Petitioners' proposal would divide [Student]'s enrollment between FPG, for two days a week, and the Mariposa School, in Cary, North Carolina, for three days a week. The Mariposa School specializes in teaching children with autism a curriculum of fundamental language and learning skills. Mariposa enrolls only students with disabilities. The staff, who work with students one-on-one, use the principles of Applied Behavior Analysis (ABA), and Mariposa uses the Assessment of Basic Language and Learning Skills (ABLLS) for programming.
104. [B.L.], the FPG physical therapist at the time, attended the meeting in spring 2009 at which the Petitioners first proposed that [Student] attend both Mariposa and FPG during the 2009-10 school year. [B.L.]'s recollection of the meeting was that Petitioners were not unhappy with FPG but just wanted to try a different style of program. [B.L.] did not recall Petitioners stating that [Student] was not making progress at FPG.
105. At the time of the May 20, 2009 IEP Team meeting, [Student]'s IEP Team included [Student]'s parents, [Mother] and [Father]; [B.F.], [R.M.], FPG administrator; [K.D.],

FPG's speech language pathologist; [T.J.], FPG's occupational therapist; Lori Jo Hanks, FPG's classroom teacher; and [B.L.], FPG's physical therapist. With the exception of Respondent's LEA representative, [B.F.], [Student]'s entire IEP team was present at the May 20, 2009 IEP Team meeting.

106. Because Respondent's LEA Representative, [B.F.], was not present at the May 20, 2009 IEP team meeting in which [Student]'s parents proposed a split program for [Student]'s 2009-2010 IEP, [Father] requested a meeting with [M.D.F.] to review the split program.
107. [Father] met with [M.D.F.] on June 9, 2009, at [M.D.F.]'s Chapel Hill office. During the meeting, [Father] described the proposed split program between FPG and Mariposa to [M.D.F.], and detailed Petitioners' rationale for it (as he and [Mother] had presented it to [Student]'s IEP Team on May 20, 2009). This included [Father]'s belief that significant progress had been made by [Student] as a result of the instructional methods employed by [T.M.] at [##], which were consistent with those employed at Mariposa to teach children the curriculum of basic learning readiness skills. [Father] also discussed the staffing changes and staff reductions at FPG.
108. [M.D.F.] recalled [Father] asking about what other services the school system offered. In response, [M.D.F.] outlined the continuum of services that the school system provided, from itinerant services provided in child care centers and by appointment to self-contained classes, which were composed of three to seven students with disabilities. Such classes typically have a licensed teacher and two assistants. [M.D.F.] testified that self-contained classes offer opportunity for students to have one to one interaction, given the low student-teacher ratio. [M.D.F.] also explained cluster groups, in which children with disabilities are placed in pre-K or Head Start classes. The level of service in cluster groups is similar to what is provided at FPG.
109. [Father] did not express any interest in placing [Student] in one of these classes. [Father] asked whether the school district would be willing to allow a split program, in which [Student] would spend some of her time at Mariposa and some of her time at FPG. [Father] testified that he requested that Respondent fund the split program (two part-time enrollments, one at FPG and the other at the Mariposa School).
110. [M.D.F.] testified that [Father] did not ask him if the school system would pay for the Mariposa program during that meeting.
111. [Father] testified that [M.D.F.] indicated that Respondent would not fund the Mariposa portion of the split program. [Father] recalled that [M.D.F.] stated that Respondent did not have any history of funding a private placement located outside of Chapel Hill or Orange County. [Father] further recalled that [M.D.F.] advised [Father] that FPG would be able to offer more scheduling flexibility than Respondent's public school placements, and that, in any event, utilization of Respondent's public schools in the proposed split program would not likely be a viable option.
112. [M.D.F.], who vaguely recalled being asked the question, said at the hearing that there was a history, although not extensive, of out-of-district placement.

113. Petitioners later drafted a memo seeking reimbursement, in which [Father] described his meeting with [M.D.F.]. [M.D.F.] did not recall whether [Father] asked at that meeting if a private placement at public expense was available, and his notes of the meeting do not reflect a conversation about this topic. As [M.D.F.] recalled it, the discussion at the meeting was about services. [Father] told [M.D.F.] at the meeting that he and [Mother] “did not have a criticism of the folks at Frank Porter Graham. We felt quite good about them.” (T. Vol. 6, 1137:5-8).
114. At the time of [Father]’s discussion with [M.D.F.], [Father] did not know that Respondent’s contract with FPG provided that, once a child is placed at FPG, the fees Respondent pays FPG for each child are non-refundable, even in the event of a reduction in the child’s services while at FPG or the withdrawal of the child from FPG. (See, P Ex. 377A and 377B.)
115. [Father] testified that he and [M.D.F.] also discussed summer instruction and that [M.D.F.] characterized the school system’s summer program as “camp,” which would not have an academic or related service support.
116. According to [M.D.F.], there was never an understanding between Petitioners and the school district that the district would pay for [Student]’s evaluations at CCSN.
117. [Student] was evaluated at CCSN in June 2009. The evaluation included both a Mullen and the Vineland. When Dr. Powers evaluated [Student] in 2009, she had a confirmed diagnosis of Cornelia de Lange Syndrome, a diagnosis that was subsequently removed. The CCSN report was not available to Petitioners or Respondent until August 2009.
118. On June 15, 2009, [Student]’s IEP team convened to begin developing [Student]’s 2009-2010 IEP. [Student]’s IEP team members from FPG were, again present, along with [M.D.F.] and [Mother]. The team reviewed [Student]’s goals in her 2008-2009 IEP, acknowledged that [Student] had not met the goals on her 2008-2009 IEP, and decided to carry over all of the 2008-2009 goals to [Student]’s 2009-2010 IEP.
119. The IEP that was drafted in June 2009 reflected [Student]’s placement at FPG five days per week for four hours per day. [Student] initially had 2.5 hours per month of speech language therapy, 1.5 hours per month of occupational therapy, and 2 hours per month of physical therapy, with a note indicating that the number and length of sessions would vary. [Student]’s 2009-10 IEP was based upon the designation “developmentally delayed.” In the space reserved for “Secondary Area(s) of Eligibility,” the IEP states, “none.” (P. Ex. 1).
120. [Student]’s new IEP was adopted June 15, 2009. At that meeting, Petitioners told the other members of [Student]’s IEP team that she would be attending Mariposa on Monday, Wednesday, and Friday and FPG on Tuesday and Thursday. [R.M.] suggested that this should not pose a concern (and Petitioners’ objections were misplaced) because, she believed that Mariposa would provide a great deal of intensity in speech language that everyone could agree would benefit [Student] in her growth and development.

121. At the IEP meeting the team discussed the benefits and drawbacks of [Student] splitting her time between Mariposa and FPG. [M.D.F.] stated that the IEP team did not place [Student] at Mariposa. [M.D.F.]’s recollection of the meeting was that the FPG staff believed [Student] was progressing there.
122. After the IEP team meeting concluded, Petitioners sent correspondence to [B.F.], [R.M.] and [K.D.]. Petitioners’ correspondence asserts several objections with [Student]’s IEP and explains the reasoning for them. Petitioners objected to the team’s level of related services offered in [Student]’s 2009-2010 IEP. Petitioners also objected to the IEP team’s eligibility designations of [Student] under IDEA. Petitioners explained that [Student] is a child evaluated as having autism stating that [Student]’s formal diagnosis in evaluations was PDD-NOS, an Autism Spectrum Disorder.
123. [T.V.] reviewed the 2009-10 IEP at the Petitioners’ request and told [Mother] that it looked good.
124. Dr. Powers testified that there were many good instructional objectives in [Student]’s 2009-10 IEP; however, he objected to the frequency of evaluation required. He stated that his concern with both the 2008-2009 and the 2009-2010 IEPs was “the intermittency of evaluation.” (T. Vol. 2 2111:20-21). He again stated that generally the IEP “was not consistent with [his] recommendations,” and that it needed “greater precision . . . and individualization for her.” (T. Vol. 2 250:22-23; 249:2-3)
125. On July 2, 2009, after Petitioners returned from the CCSN evaluations, [Father] sent correspondence to [M.D.F.], with a copy to [K.D.] and [R.M.], requesting that their e-mail exchange dated June 15, June 22 and July 2 all be forwarded to [T.W.] so that she would be aware of Petitioners’ proposed split program for the coming 2009-2010 IEP year.
126. On July 22, 2009 [Father] sent correspondence to [M.D.F.] reminding him that [Student]’s IEP was not finalized at that point, and requesting that a meeting of [Student]’s IEP team be convened by August 17, 2009. On the same date, [Mother] forwarded to [T.W.] the electronic correspondence between June 15 and July 22 relating to the development of [Student]’s 2009-2010 IEP, and requesting a response.
127. Between June 15, 2009 and July 22, 2009, Petitioners sent correspondence to Mr. Miller, [B.F.] and [K.D.] expressing their concerns and suggesting modifications to [Student]’s IEP that would resolve them. Respondent did not reply to Petitioners’ communications until Respondent’s new LEA Representative, [T.W.], contacted Petitioners on July 22, 2009.
128. [T.W.] has been the Board’s preschool disabilities coordinator since July 1, 2009. Prior to that, she was an itinerant resource teacher for preschool students. [T.W.] has a bachelor’s degree in psychology and a master’s degree in special education, early childhood intervention and family support. [T.W.] has a teaching license in North Carolina.

129. As the preschool disabilities coordinator, [T.W.] is responsible for overseeing the special education program for preschoolers with disabilities in the Chapel Hill-Carrboro City Schools. She works with families on a child's transition into the school system from early intervention. She also oversees referrals of children already in the school system into the special education program and attends IEP meetings.
130. The 75 preschoolers with disabilities identified in the Chapel Hill-Carrboro City Schools are served in a variety of ways, ranging from itinerantly (being served at the preschool office or in the community) to blended classrooms, in which students with IEPs are served alongside students without IEPs. The school system also offers self-contained classes, which are comprised solely of students with IEPs.
131. [T.W.] is the schools system representative responsible for working directly with the staff at FPG. She attends quarterly progress review meetings and receives copies of the paperwork that is generated for each student. [T.W.] testified that she speaks fairly regularly with the Director at FPG regarding students and their progress.
132. [T.W.] first met the Petitioners in the summer of 2009, after receiving an email Petitioners had originally addressed to [R.M.] and [B.F.]. [T.W.] reviewed [Student]'s file and noted evidence that [Student] had been making progress at FPG. In August 2009, [T.W.] attended a meeting at FPG to discuss several issues with Petitioners. [T.W.] took notes documenting the meeting.
133. On August 17, 2009, [Student]'s IEP Team convened again, this time with several new participants, to discuss [Student]'s dual placement and to discuss Petitioners' objections to Respondent's proposed reduction in the related service hours offered in [Student]'s 2009-10 IEP. FPG's new Director, [K.G.] was present for the meeting as FPG had recently employed her to assume that role.
134. On August 27, 2009, the IEP team agreed to a revised provision of related services in [Student]'s 2009-10 IEP. Specifically the IEP was revised to provide 30 minutes of speech language therapy, occupational therapy and physical therapy per week. The team also agreed that all of the related services provided would be delivered as direct instruction.
135. One purpose of the meeting was to discuss the level of related services that [Student] would receive at FPG, in light of her scheduled attendance at FPG being reduced from five days per week to two. As a result of that conversation, [Student]'s related services were adjusted so that she would receive speech, occupational, and physical therapy the two days per week that she attended FPG.
136. [T.W.] recalled Petitioners stating during the August 2009 meeting that they wanted [Student] to remain at FPG at least part time so that she could continue to benefit from the social exposure to typically developing peers. [T.W.] recalled that Petitioners stated that there was merit to the FPG program and the opportunities it provided [Student] to learn from peers. During the August 2009 meeting, the group discussed concerns about how [Student] would handle the transitions between two locations.

137. During the meeting, [T.W.] discussed with [Father] the various areas of eligibility under the IDEA, including Other Health Impaired (OHI). The discussion was triggered by Petitioners' question about [Student]'s continued identification in the area of Developmental Delay. [T.W.] explained what the developmental disability label meant and what is required for other categories. [T.W.] also explained that another area of eligibility could be considered for [Student]. However, a child's area of eligibility does not affect the services she receives, rather the services are driven by the IEP goals. After explaining these issues, Petitioners did not ask [T.W.] again about [Student]'s area of eligibility. [T.W.] understood that [Student]'s IEP team would consider appropriate eligibility categories for [Student] upon her re-evaluation.
138. [T.W.] testified that the individuals at the August 2009 meeting did not take the position that [Student] was not making progress at FPG, although she acknowledged that [Student]'s parents wanted to see more progress.
139. [K.G.] is the director of FPG. She has a variety of experiences working as a teacher of students with disabilities and she holds a current birth to kindergarten license in North Carolina. She was accepted as an expert in human development and early childhood education.
140. According to [K.G.], Petitioners wanted [Student] to continue at FPG in the fall of 2009, because, as they stated, they believed that FPG had been a valuable place for her progress and that she needed the opportunity to work on social integration.
141. [Father] and [Mother] emailed the staff at FPG after the August 2009 meeting. In the emails, Petitioners expressed how fortunate they felt that "[Student] had such a caring and dedicated group of teachers and therapists to foster her development." They also stated that the occupational and physical therapist's expertise was "invaluable to [Student's] growth." Finally, they expressed their appreciation of Ms. K. and Ms. C. and stated that they knew [Student] would "make great strides under [their] instruction this year." (R. Ex. 20). According to [K.G.], who attended the August 2009 meeting, the September 1 emails were consistent with Petitioners' attitude toward FPG at the meeting.
142. Petitioners initiated a discussion of the report of CCSN's 2009 Psychological Evaluations, which had been made available on August 14, 2009 and distributed to the Team. Petitioners emphasized that gaps still remained in [Student]'s core areas of educational need between what the 2009-10 IEP offered and the level and kind of services and instruction that CCSN was recommending. Petitioners explained that the recommendations were very similar to those CCSN made the prior year. The IEP team agreed to discuss those issues when the final report of CCSN's 2009 Psychological Evaluations was made available.
143. On June 22, 2009, Petitioners had traveled to Connecticut to obtain their second psychological evaluation from CCSN. Again, Dr. Powers and Dr. Palmieri conducted the assessment of [Student]'s present levels of educational performance and needs. In this second evaluation of [Student], Dr. Powers and Dr. Palmieri were able to assess improvements in specific educational domains by comparison to her performance in

those domains during their evaluation of her one year before. Dr. Powers stressed to [Mother] and [Father] (as he would again in his written report of these evaluations) the importance of his conclusion that [Student] cannot derive benefit from instruction unless it is “intensive, early, systematic, individualized” instruction “driven by instructional strategies and practices that have been well documented to be successful with kids with her profile of learning needs.” (T. Vol. 2, 204-205.)

144. Dr. Powers specifically spoke to this issue as follows: “So when we wrote the report, we were writing some very specifics about how each instructional objective should have essentially a teaching template so there would be precision. The absence of the precision places [Student] at risk for learning, or mis-learning as it were, because of inconsistency of adult behavior, adult instruction with a child. So to the extent that we have two people or three people or four people working with a child over the course of a day-and let’s take as an example trying to increase the number of spontaneous requests for things that she will make by using a gesture towards it. And we have one individual who holds it up like this (indicating) and smiles and looks expectantly to get her to respond to it. And we have another individual who simply places it in front of her and waits for her to make the request. We have two different interactions between two different adults. That’s an imprecise teaching moment for the child. And when you have a kid who doesn’t pay attention to the right thing, you run the risk that the child will not know what they’re supposed to do or respond randomly or respond incorrectly but not know that it’s going to be incorrect because they’re not sure what they’re supposed to do in the first place. When you have that kind of inconsistency, you have difficulty with learning.” (T. Vol 2, 205-206)
145. In the 2009 evaluation, Dr. Powers wrote that [Student] showed improvement in nearly all areas compared to her last evaluation, with the exception of visual reception skills. Dr. Powers stated that “based upon what she did in our evaluation in [2009] with some of those play skills that we want to take some of those skills and embed them into a ... peer and peer environment because she showed some prerequisite skills.” (T. Vol. 2, 250:7-15). Dr. Powers stated that, although [Student] was showing growth in some areas, it was not the growth that he would have expected to see.
146. In August 2009, Dr. Powers provided Petitioners with a letter that outlined critical recommendations in advance of the final report being produced later that year. The initial letter provided to Petitioners included a section that read: “[Student] has made very good gains with respect to her direct instruction/applied behavior analytic teaching programs at the Mariposa program. This is consistent with her learning profile and the instructional and teaching recommendations identified by us in 2008.” (T. Vol. 2, 311:19-312:4; R. Ex. 14).
147. [Student] first began attending Mariposa in September 2009, three months after she was evaluated at CCSN in June 2009. When Dr. Powers was informed of his error, he sent Petitioners a second letter, with the same date as the first, in which he deleted any reference to [Student] making “very good gains.” (T. Vol. 2, 311:15-18; 313:12-314.5; P. Ex. 4). Although Dr. Powers testified that he was referring to [##] when he referenced Mariposa in the first letter, the revised letter makes no reference to [##]. The second letter makes no mention that it was a revised letter written on a different date.

148. Dr. Shea testified that the 2009 report reflected improvement in [Student]’s joint attention, her interactions with peers, and a decrease in stereotypical behavior. [Student] also made progress in her toilet training and in her eating between 2008 and 2009. Dr. Shea stated that based on the descriptions of [Student]’s behavior in the 2008 and 2009 evaluations, [Student] made “striking progress.” (T. Vol. 11, 1999:19-2000:23).
149. [T.V.] confirmed that [Student] was making progress by September 2009. [T.V.] stated that [Student] “was a lot less frustrated” and that “[s]he was eager to engage and eager to try to talk when she was being successful.” (T. Vol. 1 98:7-9)
150. Shortly after [K.G.] started at FPG, Petitioners arranged for [T.V.] to do an orientation to Verbal Behavior Analysis for [Student]’s teachers and therapists. This training session took place on August 26, 2009. [K.G.] attended, along with several other staff members, and recalled that the strategies were familiar to her and that although the terminology may have been different, the strategies had been used at FPG.
151. CCSN’s Final Report of CCSN’s 2009 Evaluation was received on October 2, 2009. Petitioners provided a copy to Respondent and to [Student]’s IEP Team and requested a meeting of [Student]’s IEP Team to discuss CCSN’s findings and recommendations. Due to scheduling conflicts, [Student]’s IEP Team did not convene to discuss CCSN’s findings and conclusions until November 17, 2009.
152. Prior to the November 17, 2009 IEP Team Meeting, [Student]’s then-current SLP, [M.D.], reviewed the CCSN Report, and, based upon her own experience with [Student] there was nothing in the report that she would not agree with. She saw that [Student] was being more verbal now than when the evaluation was completed in June.
153. On November 17, 2009, a meeting of [Student]’s IEP team was convened. The team members in attendance included [C.K.], [M.F.] ([Student]’s new SLP at the time), [B.L.], [T.W.], [L.C.], [Mother] and [Father] Also in attendance at this meeting was FPG’s new director, [K.G.].
154. Respondent’s IEP review document states that the team “reviewed [Student]’s independent report from CCSN, and parents expressed concerns regarding [Student]’s progress. [The Team] also discussed [Student]’s dual placement, its benefits and constraints, and agreed that... is the best option right now.” (P. Ex. 45.) The document goes on to state that the team “went over [Student]’s goals and decided to prioritize goals related to joint attention, sustaining attention to less preferred activities, and peer interaction. [The team] agreed to emphasize objectives within goal [number] 1, and embed these into strategies used to address all goals.” (*Id.*)
155. During the 2009-10 school year intervention meetings were held every other week. During the meetings, classroom teachers and therapists would discuss children’s progress in the context of strategies that were working well and what was going on in the classroom. At those meetings, the teachers would create lesson plans integrated with children’s IEP goals. The lesson plans, which focused on which IEP goals a



particular activity might be organized around, were destroyed at the end of each school year and were not exhibits in the hearing.

156. The related service providers working with [Student] at FPG periodically emailed Petitioners to update them on [Student]'s activities and progress during the 2009-10 school year. In addition, notes were periodically sent home to Petitioners after the embedded intervention meetings.
157. At quarterly progress meetings, the team reviewed the IEP goals and benchmarks to discuss where progress was being made, where more attention was needed, and what to continue. At the meetings, the individuals who worked with [Student] would look at each goal and objective and discuss whether she was consistently exhibiting the skill identified. The team would not consider a goal to be met if somebody observed [Student] doing it one time in isolation. [K.G.] testified that in order to find a goal or objective mastered, the staff would need to see a skill all the time on a general basis. There might be instances where the behavior was not observed, but the team had to feel certain that those instances were rare.
158. When [K.G.] started at FPG in August 2009, there were eight classrooms, three of which served children ages 3 to 5. Approximately 40 students are served in those three classrooms, about a quarter of which were students with a wide range of disabilities.
159. [Student]'s classroom in the fall of 2009 had 14 students. There were three staff members in the classroom on a full-time basis, with a fourth in the classroom for most of the day. [M.J.] was the lead teacher in [Student]'s classroom in fall 2009. She has master's degrees in teaching and early childhood education and began working at FPG in 1992.
160. [M.J.] obtained her birth to kindergarten teaching license after she began working at FPG. She became the assistant director at FPG in 1996 and remained there until 2003, when she moved out of North Carolina. [M.J.] returned to North Carolina and worked as the director of FPG for a year, until [K.G.] was appointed in 2009.
161. [M.J.] took a teaching position in [Student]'s classroom in September 2009. Her birth to kindergarten teaching license had expired in 2007. Also in the classroom were two full-time assistants: [C.K.], who had a bachelor's degree in psychology, and [L.C.], who had 25 years experience at FPG. A third assistant, [L.G.], was in the classroom often. All three of the assistants were licensed through the Division of Child Development.
162. According to [M.J.], the classroom had areas for different activities, including blocks, housekeeping, sensory, manipulatives, and a quiet area with books. There is a space for events that involve movement or sitting together in a group, where circle time would occur. The classroom also had tables for eating and additional activities.
163. When [M.J.] worked with [Student], she would move into whatever activity [Student] was doing and would try to interact with her, either by interfering or introducing something new. If [Student] was playing, for example, at the water table, she would not necessarily have an adult with her the entire time, although she was always being

monitored when she was in the classroom. Every day that [Student] was at school, there were therapists in the classroom. According to [M.J.], there was always a therapist in the classroom for at least a two-hour period.

164. All of the staff in the classroom would work with [Student], and they could be working on a specific skill or working more generally on [Student]'s social goals, which could be worked on anywhere. [M.J.] observed progress in [Student]'s ability to participate in group time. Initially, [Student] needed adults prompting her to get her to circle time; however, [M.J.]'s recollection is that by December [Student] was regularly coming to group time without hesitation. [M.J.] testified that [Student] was spending time in close proximity to other children.
165. [M.J.] testified that [Student]'s ability to move through classroom routines more easily improved during the time that [Student] was at FPG. [M.J.] recalled [Student] having lengthy crying spells during her first year at FPG, and she stated that those had stopped happening by the time [Student] left FPG. She acknowledged that [Student] may have been crying at circle time in September 2009; however, she did not recall [Student] having a lot of trouble with transitions by January and February 2010. According to [M.J.], when [Student] left FPG she still sometimes needed adult prompts, but she was moving through the day without a lot of difficulty.
166. When asked about the significance of [Student]'s area of eligibility, [M.J.] testified that it was one of the least useful things to know about a child. Instruction is driven by the goals and benchmarks, which are dictated by a combination of the child's needs and interests and the parents' expectations.
167. In the summer of 2009, [K.G.] asked Dr. Pierce to review student files at FPG, in the absence of [K.D.], who had just left. A new speech language therapist had not yet been hired. Dr. Pierce recalls reviewing [Student]'s file and suggesting using a small flip chart that [Student] could use to make choices or follow a schedule. Dr. Pierce created a chart but quickly learned that it was not being used for [Student] because [T.V.] did not recommend using it.
168. [M.D.F.] is a licensed speech language pathologist. [M.D.F.] moved to North Carolina from New York, where she had experience working on ABA teams. [K.G.] hired [M.D.F.] because she thought [M.D.F.] had interesting clinical knowledge and experience.
169. [K.G.] said that [M.D.F.] provided good support for children in the program. [K.G.] welcomed experimentation in an effort to do what was needed to help students reach their IEP goals. [K.G.] stated that she did not prohibit therapists from pulling students out of the classroom into other settings.
170. [M.D.F.] worked with [Student] at FPG for approximately two months in the fall of 2009, from September to November. She served [Student] in the classroom and also attempted to pull [Student] out of the classroom to work with her in a more quiet setting.

171. As she got to know [Student], [M.D.F.] stated that she “knew very clearly that [Student] needed . . . individual, one-on-one attention” because, with [Student]’s disorder, it is ideal “to teach without distraction one on one and then . . . generalize across environments with increased disruption.” (T. Vol. 5 846:2-3; 11-13)
172. [M.D.F.] asked [K.G.], the director of FPG, if she could pull [Student] out to work with her a little bit one-on-one. At first [K.G.] agreed, but after [M.D.F.] pulled [Student] out of the classroom for a third time, [K.G.] informed her that some of the classroom staff were upset. [M.D.F.] testified that [K.G.] told her that [Student] “should be with a group all of the time.” (T. Vol. 5 850:4)
173. [M.D.F.] testified that it was explained to her that it is FPG’s “culture” that “children have all of their learning done in the group setting where everything is embedded in the classroom model.” (T. Vol. 5 864:21-25).
174. [M.D.F.] testified that there was nothing in the professional literature that she could find that supported denying direct, one-to-one instruction providing it is done in a natural setting where it could be generalized for ongoing learning in a classroom environment and communicated to classroom staff for their added support.
175. [M.D.F.] testified that, without direct intervention, which FPG was not allowing her to do, she could “not effectively” deliver what the IEP required. (T. Vol. 5 888:3) She stated that it would be “hit-and-miss.” (T. Vol. 5 888:15)
176. [M.D.F.] and [C.K.], with [K.G.]’s knowledge, observed [Student] at Mariposa in mid-October, 2009. After the visit, [M.D.F.] and [C.K.] spoke with [Mother] in the parking lot. [C.K.] later came to [K.G.] to express her concern about some of [M.D.F.]’s statements. Specifically, during the conversation, [M.D.F.] informed [Mother] that she was glad to see [Student] so happy at Mariposa because she thought [Student] was unhappy at FPG. [K.G.] testified that had [M.D.F.] expressed such a concern in an IEP meeting with other members who could provide input, she would have viewed it as a problem solving activity. However, she felt that [M.D.F.] was unprofessional in her approach to [Mother].
177. A quarterly progress meeting for [Student] was held in November 2009. During the meeting, the group discussed [Student]’s split program and whether she was handling the transitions appropriately. [K.G.] stated that she had seen [Student] make social progress at FPG since the summer. The group also discussed prioritizing certain goals, given [Student]’s reduced schedule. Specifically, [Father] asked that FPG focus on [Student]’s goal to “initiate, respond to, and maintain play and verbal interactions with both adults and her peers in a variety of daily routines and activities.” (T. Vol. 10, 1750:19-23, T. Vol. 12, 2217:15-2218:13)
178. At one point, [Father] asked whether the district had a specific classroom that operated for 30 hours per week using a Verbal Behavior Analysis (VBA) or ABA approach. [T.W.] told him that the district did not endorse one particular methodology over another and did not have such a classroom. However, she discussed with [Father] the

continuum of settings and explained that if an approach worked with a child, it would be used with the child.

179. The other members of [Student]’s IEP team did not agree that [Student] required an ABA approach to make progress. [T.W.] testified that a related service provider who had experience working in an ABA setting expressed her preference for a blended approach using ABA strategies across settings.
180. According to [T.W.], there was not a consensus among [Student]’s team members that she required the split programming to make progress. Rather, the team agreed that the split program was the best option for meeting her parents’ requirements for what they wanted for [Student].
181. [K.G.] was concerned about FPG’s ability to deliver a program intended for five days per week in only two days, and she expressed that concern in the November 2009 meeting. [K.G.] agreed with continuing the split program in November 2009 because she understood that Petitioners wanted to see if it would work. Petitioners felt [Student] needed it and the school system and FPG staff were attempting to work with them.
182. During the 2009-10 school year, [B.L.] worked with [Student] for 30 minutes on Tuesday and Thursday. Because [B.L.] was at FPG whenever [Student] was there, she rarely delegated working on gross motor goals like going up and down the stairs to the teacher. However, she did suggest that the teacher work with [Student] on carrying blocks in the block center, as that was a good balance activity that she could do in the classroom.
183. [B.L.]’s physical therapy sessions with [Student] were designed for [Student]’s benefit even when there were other students present in the environment. Although [Student] was not always engaged in what they working on, [B.L.] believed they were able to do constructive work almost every time they worked together. If an activity did not go well, [B.L.] would move on to something else.
184. [B.L.] testified that [Student]’s postural insecurity, which is a sensory issue, was a part of [Student]’s profile, but not a huge stumbling block. [B.L.] did observe [Student] engaging in avoidance behaviors, including saying “ouch,” and sometimes walking away on the playground. [B.L.] testified that such behavior was not atypical for a 3- or 4-year old child working on physically demanding skills.
185. When [B.L.] and [Student] first started working on [Student] joining peers in a variety of gross motor play, [Student] needed maximal assistance to access the playground structure. By the time [Student] withdrew from FPG, she was doing that without any physical assistance. [Student] also was able to catch a ball and to kick a ball gently.
186. In a progress report drafted shortly before [Student] left FPG, [B.L.] described [Student]’s growth. She was able to step up and down single step heights of 5 inches or less without hand support. [Student] also decreased the amount of time it took to descend two flights of stairs from the classroom to the playground, from between 2 minutes 30 seconds and 3 minutes in February 2009 to an average of 1 minute in

February 2010. In February 2010, [Student] was able to go up the steps in an average of 90 seconds, a minute faster than in February 2009. [Student] also was able to sit on the riding toy and propel it with her feet, although she did not make progress on pedaling the tricycle. [B.L.] testified that if [Student] felt insecure she would stop walking, but she observed [Student] doing that less frequently during the time she worked with her.

187. In a February 25, 2010, email to [Mother], [B.L.] described an interaction between [Student] and her peers in which [Student] was really engaged. During her testimony, [B.L.] described [Student] as joyful as she sang and bounced on a ball with [B.L.] and eventually three other students. Another student started to fall off one of the balls and [Student] reached out to grab the other child's hands, which would have been physically challenging for [Student]
188. [B.L.] recommended that [Student] remain on the physical therapy caseload once she started kindergarten and that the physical therapist at her new school evaluate her to determine what level of services she should receive. [B.L.] testified that it would be difficult to predict the level of service necessary because [Student] required the physical therapy necessary to benefit from her educational placement and she would have to be observed in the setting to determine what was necessary.
189. [B.L.] wrote progress notes after each session with [Student] during the 2009-10 school year. [B.L.] testified that if [Student]'s behavior was interfering in a session, it would have been reflected in her notes more often.
190. Dr. Pierce was asked to return to FPG to provide speech services to students after [M.D.F.]'s replacement, [M.F.], went on maternity leave. From January 2010 until [Student] withdrew from FPG in March 2010, Dr. Pierce spent Tuesday and Thursday mornings in [Student]'s classroom and worked directly with her to provide speech services. Dr. Pierce reviewed [Student]'s chart to see what she and [M.F.] had been working on. Dr. Pierce noted that they had been working on social interaction phrases and continued working on those goals.
191. Dr. Pierce's first session with [Student] was on January 21, 2010. During their sessions, Dr. Pierce targeted words and phrases that she wanted [Student] to use and would encourage and model for her. She also contrived opportunities for her to use those words and phrases and then reinforce her while helping her play.
192. Dr. Pierce noted [Student]'s ability to imitate longer sentences, up to five words, including, "Throw the ball up high." According to Dr. Pierce, using sentences of that length is close to what a typical 4- or 5-year old child would use. [Student] was using the phrase in a session involving two other girls with whom [Student] had developed a friendship. According to Dr. Pierce, [Student] was starting to use novel words and was developing her vocabulary. During their sessions, Dr. Pierce did not observe [Student] getting upset when other children were around, and she had exchanges with the other students, particularly the two girls with whom she had developed friendships.

193. Dr. Pierce would not have diagnosed [Student] with apraxia. She stated that it is difficult to administer the whole VMPAC to young children because it's a long test and it is difficult to maintain a child's attention. However, Dr. Pierce used aspects of the VMPAC with [Student]. Dr. Pierce testified that she administered sub-items within the section of the VMPAC requiring the student to repeat multisyllabic words, although Dr. Pierce could not recall the words. When Dr. Pierce administered sub-items from the VMPAC to [Student], she was following the protocol of using specific target words and having a child to repeat those target words. She was using a standard test, although she did not have an opportunity to complete the entire test.
194. Dr. Pierce had [Student] imitate target words, increasing the number of syllables. [Student] was able to imitate those target words with consistency in both the consonants and the vowel production, and she was able to imitate consistently over number of productions. Dr. Pierce testified that in her experience, [Student] did not need physical cues because she was able to imitate the words.
195. In addition to administering the sub-items, Dr. Pierce listened to [Student] put syllables together and to see whether there was consistency in vowel and consonant and then consonant-vowel-consonant productions over repetitions. Dr. Pierce noted that when [Student] imitated her speech, [Student] was able to consistently produce the initial, medial, and final sounds in imitation. However, when she produced speech more spontaneously, Dr. Pierce could hear [Student] delete the final sound sometimes or produce a more infantile or younger production. She testified that [Student]'s difficulties sounded more like a phonological processing disorder than apraxia.
196. Dr. Pierce was impressed with how much more spontaneous speech and language [Student] was using from the time she initially reviewed [Student]'s records in August 2009 until January 2010. Dr. Pierce saw [Student] making progress during the time she worked with her. [Student] increased her mean length of utterance and was using language in appropriate contexts. According to Dr. Pierce, [Student] was making significant progress in her ability to use speech and communicate. [Student] was putting multiple words together, and other children and adults could understand her well enough to be able to interact with her. Dr. Pierce also saw growth in the areas of social interaction and emotional development. Her opinion was based on her interactions with [Student] during the three hours each Tuesday and Thursday that she spent interacting with and observing [Student].
197. [Student]'s team convened in February 2010 to discuss her progress on her goals. During that meeting, the team reviewed each of [Student]'s goals and objectives and determined that she had met benchmarks in eight goals listed on her IEP. The team discussed their observations of [Student] using words for common objects, and that [Student] had exceeded the five to ten word benchmark. The team also discussed [Student]'s progress in attending to circle, when she typically had someone with her but was more often joining specific activities, particularly singing. [Student] was also using toys in functional ways with moderate assistance; however, the team wanted to continue monitoring her ability to play in certain areas with only minimal assistance, because she was not playing functionally in every area.

198. The team observed [Student] following the daily routine and transitioning from activity to activity with moderate assistance but not yet able to do those things with only minimal assistance. [Student] demonstrated progress in engaging in play schemes with adults, and the team discussed continuing to encourage and support her in engaging in pretend play with peers.
199. [Student] was also able to use utensils appropriately with only occasional physical cues or reminders. She also was able to follow a hand washing routine with minimal assistance and had made progress in her toileting routine.
200. [B.L.] noted, with agreement from others, that [Student] had made progress in stability, confidence, and mobility and that running was an emerging skill. The team also discussed [Student]’s ability to transition between steps and move over obstacles, which reflected increased balance and core support. The team also noted that [Student]’s ability to jump from a step with two hands held was an emerging skill. The team also discussed [Student]’s progress in using a riding toy and in her ball skills, which was an activity that required [Student] to orient toward another person.
201. [T.W.] did recall the parents questioning why [Student]’s goals had been carried over from one IEP to the next and recalls the team discussing a child’s transition from early intervention services to special education. [T.W.] testified that projecting where a child will be in a year can be difficult, particularly when drafting the first IEP.
202. At the meeting, Petitioners spoke with [K.G.] and asked whether she was concerned about the level of [Student]’s progress. [K.G.] explained that she thought [Student] had made good progress in the context of having two short days per week, particularly when 90 minutes of those days were devoted to therapies. [K.G.] testified that the FPG staff was seeing [Student] make the type of social and language progress that would allow her to take advantage of opportunities to interact with peers and participate more fully and independently in the classroom. [K.G.] testified that [Student] had the skill set to benefit from the services that she received at FPG.
203. Several weeks after the February 2010 meeting, Petitioners withdrew [Student] from FPG. On March 1, 2010, Petitioners notified Respondent of their intent to enroll [Student] privately at public expense on or after March 15, 2010. They did so in a letter delivered to [T.W.], Respondent’s LEA Representative, and [L.D.], the Executive Director of Respondent’s Exceptional Children’s Program. On March 15, 2010, Petitioners withdrew [Student] from FPG and [Student]’s five-day program at Mariposa began soon thereafter.
204. Mariposa utilizes the ABLLS-R and VB-MAPP standardized curriculum to guide the selection of [Student]’s skill targets and to track her progress toward mastery of the basic learning and language skills. That placement is supplemented by related services.
205. [Student] receives occupational therapy in one 60-minute session per week targeting her fine motor skills from [C.W.], O/TRL. [C.W.]’s evaluation report recommends that [Student] receive two to three 60-minute sessions per week. [C.W.] is employed by [##], but provides occupational therapy services to [Student] at the Mariposa School

once per week so that [Student]’s Mariposa instructors are able to participate in the therapy and integrate the targeted fine motor skills into [Student]’s daily instruction.

206. [C.W.] utilizes direct, one to one instructional methodologies when working with [Student] because, as [C.W.] explained in her testimony, [Student] would not benefit from instruction delivered by less intensive means. [C.W.] explained that this is primarily due to [Student]’s tendency, in the absence of direct prompting and one-to-one engagement, to revert to stereotypical, self-stimulatory behaviors and scripting. [C.W.] testified that she believed that [Student] had made significant progress through the occupational therapy Webb had provided.
207. Petitioners provide an additional one-hour per week of occupational therapy delivered by [A.L.], O/TRL, at [A.L.]’s clinic. [A.L.] testified that she has a strong preference for methodologies other than ABA, and maintains several group-based instruction programs for children who can benefit from group instruction. [A.L.] utilizes methods that closely resemble ABA methodologies when working with [Student]. [A.L.] explained that, “given the nature and complexity of [Student]’s challenges, both of the sensory challenges that she has as well as with the motor and motor planning praxis challenges that she has that she, in my opinion, requires individualized attention from a responsive, qualified adult who can ... address her needs directly.” (Tr. Vol. 6, at 1063-64.)
208. [Student] receives speech-language therapy with [T.M.] in the clinic at [##], once a week for forty-five minutes. [T.M.]’s instruction is one to one, individualized, direct instruction on specific articulation skill targets.
209. [Student] also receives speech-language from [S.Y.], also employed by [##], once a week for forty-five minutes. [S.Y.]’s instruction is delivered to [Student] at the Mariposa School, and is direct, one-to-one, individualized, speech-language instruction.
210. The costs of the foregoing placement and services are all collected by Petitioners and synthesized into a data compilation. Petitioners’ compilation of costs was admitted into evidence as Petitioners’ Exhibit Number 406.
211. Shortly after [Student] started at Mariposa full-time, [Mother] expressed concern to [T.V.] that Mariposa was working on [Student] using two-word combinations while [Student] was already using sentences at home. In a consultation note from November 2009, [T.V.] wrote, “[Student] is fairly consistently using three and four word sentences to request lately.” (R. Ex. 91; see also T. Vol. II, 367:8-13, 390:15-391:12.)
212. Two of [Student]’s instructors at Mariposa testified during the hearing. There was no testimony that either are licensed teachers. Both had a brief training at Mariposa before working with [Student]. Neither worked with [Student] in any setting other than Mariposa, and the teaching strategies they have used with [Student] are those taught to them at Mariposa.
213. According to [A.R.], [Student] started at Mariposa with a lot of skills, according to her parents. [A.R.] worked with [Student] beginning in January 2010. She testified that



[Student] had, at that time, a lot of verbal skills and a lot of play knowledge. [A.R.] said that some students begin at Mariposa with next to nothing filled out, which was not the case for [Student].

214. [Student]'s current goals are probed during the first 30 minutes of her daily sessions. With the exception of one target, the probe data is what is reflected in the ABLLS grids. [A.R.] testified to what was reflected in the ABLLS grids; however, she was not responsible for creating the grids or determining which skills [Student] would work on after mastering a skill. She acknowledged that there were errors in the grids. For example, the ABLLS grid for May 2010 indicates that certain goals are being targeted, while the team meeting notes do not reflect that they are current targets. The May 2010 team meeting notes also do not reflect that K1 or K2 were goals that were probed or mastered. Once a target on the ABLLS is mastered, it is put on an ABLLS card and added to the mastery mix, which is then used throughout a session, during table time.
215. [Student] is with an adult, one-on-one, throughout her day at Mariposa, including lunch. While there are other children present in the environment, those other children are also accompanied by their own teacher.
216. [D.R.] began working with [Student] at Mariposa at the end of March 2010 and remains her instructor. [D.R.] has worked at Mariposa since January 2007. She testified that [Student] was a fast learner, and higher functioning than other students with whom [D.R.] has worked.
217. [D.R.] works with [Student] on goals at a work table. In the afternoon, [Student] has a 10 to 15 minute circle time with other students, each of whom also has his or her own instructor. [D.R.]' notes indicate that [Student] was enjoying and doing well in circle time during the summer and fall of 2010.
218. [T.V.] testified that [Student] is not ready to learn in a group setting. She stated that when [Student] is with other students, [D.R.] was right beside her prompting her or helping her. When [Student] is not participating in circle time, she cannot see the other students in her classroom, given the classroom structure.
219. [D.R.] acknowledged that there are goals that [Student] masters within two weeks. [Student] either mastered the target of showing interest in the behavior of others and attending to verbal and physical behavior of peers within two weeks, or probed out of that target altogether, indicating that she learned that skill without being specifically instructed on it. [Student] also named numbers 12 through 19 the first time she was asked, without being taught those numbers.
220. An evaluation of [Student]'s speech language skills was conducted in multiple stages beginning in January of 2010 and concluding in early February of 2010. The evaluation was designed and implemented by [K.F.], BA, BCaBA, [T.V.], MS, CCC/SLP, and [T.M.], MS, CCC/SLP. The report of Petitioners' 2010 Speech-Language Evaluation was admitted into evidence as Petitioners' Exhibit 17.

221. The following tests were administered: Assessment of Basic Language and Learning Skills (ABLLS); the Receptive One-Word Picture Vocabulary Test; the Expressive One-Word Picture Vocabulary Test; the Hodson Assessment of Phonological Patterns; and the Kaufman Speech Praxis Test for Children (KSPT). The evaluators concluded that [Student] exhibited moderate verbal dyspraxia, and that [Student]'s speech difficulties were due to a combination of weak oral musculature, motor planning difficulties and a phonological process disorder.
222. The speech language skills evaluation recommended continued speech language therapy at least 3 times a week with daily home practice and an emphasis on increasing intelligibility. It also recommended continued intensive language instruction utilizing ABA/AVB teaching procedures, and coordination in teaching procedures between Mariposa, speech-therapy, home and preschool.
223. In June 2010, [C.W.], the occupational therapist at [##], conducted an occupational therapy evaluation on [Student] to assess her fine motor skills and sensory processing needs. [C.W.] recommended occupational therapy instruction in 60 minute sessions, two to three times a week. [C.W.] recommended occupational therapy be delivered through intensive, one to one, direct instruction.
224. [C.W.] has worked with [Student] since June 2010, when she first evaluated her. After her evaluation, [C.W.] created a six-month treatment plan for [Student]. Of the seven goals that [C.W.] included on her treatment plan, [Student] exceeded one goal, met three others, and had to continue the remaining three goals, despite working with [C.W.] for only one fourth of the minimum therapy time [C.W.] recommended for [Student] to work on the goals.
225. [A.L.], O/TRL, prepared a report of her findings and recommendations based on her work with [Student]. Among several recommendations, [A.L.] recommended continued occupational therapy in a sensory integration gym 2-3 hours per week and continued Wilbarger Deep Pressure Proprioceptive Technique 3-6 times per day. [A.L.] explained in her testimony that the occupational therapy [Student] required was intensive, direct, one to one instruction.
226. [Student] continues to work with [A.L.], who further testified that she has seen improvement in [Student] in therapy in the past six to eight months but that she cannot explain how much of that change is related to [Student]'s increasing age and maturity level. According to [A.L.], [Student] does not require ABA to acquire skills. [Student] also has made progress with her, although she has received less therapy than [A.L.] recommends. [A.L.] testified that [Student] would not be a good candidate for group instruction.
227. By the time Dr. Powers evaluated [Student] in 2010, she met the threshold criteria for autism, rather than just Pervasive Development Disorder-Not Otherwise Specified. The 2010 evaluation, which was conducted prior to the drafting of 2010-2011 IEP, recommended the number of days per year that [Student] needed instruction, as well as the number of hours per week.

228. CCSN's 2010 Evaluation Report contains a number of observations, findings, and recommendations regarding [Student]'s private program. They include, "Mariposa School is consistent with [our] recommendations, ... the placement at FPG was very clearly not addressing needs effectively, and we were supportive of a change to provide more intensive programming at Mariposa. This placement [at Mariposa] should be considered more appropriate and effective, thereby less restrictive, setting than the former placement at FPG." (P. Ex 7. at 4, 14.). The report further states, "In following [Student]'s skill gains across her evaluation cycle with us it is evident that the gains made between her first and second evaluations, where services were provided primarily at the Frank Porter Graham School, were weaker than those between the second evaluation and this most recent evaluation where service delivery has expanded at the Mariposa School. We understand she is slated for a service increase to a full-day program at the Mariposa School and we strongly encourage that her educational team actively support this process." (*Id.* at 3.)
229. The observations in the 2010 report did not reflect the same level of growth as the 2009 report. For example, although [Student] was interested in more toys in 2010 than in 2009, the report does not reflect a significant difference in [Student]'s speech. The 2009 evaluation describes [Student] as using single words with some two-word phrases. In 2010, [Student] was primarily using single words and short phrases.
230. The 2009 evaluation included a discussion of how [Student] was able to integrate looking at someone and talking to them, commenting, showing toys, pointing, and leading others to what she wants. In 2010 that same area was described as very fragile and an area of significant delay. The report also states that [Student]'s ability to share remains extremely limited.
231. All three of the CCSN evaluations note that [Student]'s social capabilities are a matter of significant concern.
232. [Student]'s Vineland scores in each of the three CCSN evaluations were at or below the third percentile and fell around 70, which, when looked at in conjunction with cognitive testing, would suggest a diagnosis of intellectual disability. The Vineland differs from a cognitive or developmental measure like the Mullen in that the scoring is based on information provided by the parent, rather than an objective assessment of what the child is able to do.
233. The composite score of the 2010 Mullen was below 49. While Dr. Shea hesitated to draw a conclusion from the first administration of the Mullen, she stated, "The more data points you have ... the more you can suspect with some certainty that you are actually seeing the child's skill level." (T. Vol. 11, 1996:14-1997:1.) Dr. Shea testified that the CCSN evaluations support the conclusion that [Student] has two developmental disabilities, autism and an intellectual disability.
234. The CCSN evaluation stated that [Student]'s gains were compelling but that she remained vulnerable in the area of functional communication and thus required intensive intervention support. The report suggests that [Student] would be at significant risk of skill loss or failure to make necessary gains to support appropriate

increases in independence if she is not placed in a program that has a well-established service delivery process for utilizing Applied Behavior Analysis (ABA) teaching methodologies.

235. Dr. Powers believed as reported in the evaluation that [Student] requires access to a one-to-one instructional aide throughout her entire day in order to ensure that appropriate attention may be provided to establishing direct instruction and for guiding the generalization process. He recommended that [Student] be at Mariposa full time and receive a minimum of 30 hours of one-to-one instruction per week.
236. Dr. Powers agreed that a teacher can provide a precise instructional methodology even if it is not explicitly outlined in an IEP and that a student can have precise, data-driven teaching without the use of the ABLLS. Dr. Powers acknowledged that when evaluating a student, what the parents are willing and interested in providing to the child, are among the factors that he considers.
237. [K.G.] did not believe CCSN's assessments were directly tied to their recommendations. She thought that the assessments themselves did not suggest that [Student] did or did not need adult mediated, intensive, one on one education, and [K.G.] would not necessarily have come to the same conclusion. [K.G.] testified that the recommendations were arbitrarily connected to the test results, because the CCSN evaluators had not seen how [Student] functioned in her educational setting.
238. [Student] did not return to Respondent's school system after her parents withdrew her from FPG. From that point forward, [Student] remained enrolled full time in her private placement at the Mariposa School.
239. [L.D.] has been the executive director for exceptional children and student services for the Chapel Hill-Carrboro City Schools since July 2009. [L.D.] has 12 years of experience teaching children with disabilities and has been a special education director for 17 years. In her current position, she oversees all special education programming and supervises all of the special education teachers and related service providers in the district. There are about 1,050 students with disabilities in the school system, with approximately 160 of those students having autism.
240. [L.D.] first became familiar with the Petitioners when she received a letter from their attorney in January 2010. The letter requested a meeting with [L.D.] to discuss [Student]'s special education programming and requested reimbursement for a number of items. [L.D.] responded in writing with an offer to meet within the five-day timeframe set forth in the letter; however, the Petitioners were not available to meet.
241. A meeting was held with Petitioners on February 17, 2010. In addition to Petitioners and [L.D.], [T.W.], the district's preschool disabilities coordinator, was also present.
242. Prior to the meeting, [L.D.] read all of the information that Petitioners had included with the letter from their counsel. She also reviewed [Student]'s file and spoke with [T.W.] and [M.D.F.]. Finally, [L.D.] met with the director of FPG, [K.G.] to learn about [Student]'s program and the progress she had made there.

243. At the February 17 meeting, Petitioners' position was that [Student] had been denied a free appropriate public education.
244. During the meeting, Petitioners discussed with [L.D.] the services that they had been providing privately for [Student]. In an effort to respond to their request for reimbursement, [L.D.] talked with Petitioners about signing releases to allow school staff to speak with [Student]'s private providers and observe [Student] at Mariposa. [L.D.] completed the releases, and the Petitioners took them home to review. Petitioners did not sign the releases or give their permission for the school district to observe [Student] at Mariposa. After sending a follow-up letter, [L.D.] received a letter from Petitioners stating that any information would have to come from their attorney.
245. In a March 1, 2010 letter to [L.D.], Petitioners stated that they would be removing [Student] from FPG to enroll her at Mariposa full-time.
246. After [Student] was removed from FPG, [L.D.] corresponded with the Petitioners again to request releases for [Student]'s private providers. She also asked Petitioners about developing an IEP for the 2010-11 school year.
247. While [Student] was enrolled at Mariposa, and while Petitioners' Petition for Due Process was pending, Respondent invited Petitioners to a conference to develop a new IEP for [Student]. Petitioners accepted the invitation, but requested that the conference be scheduled for later in the summer to allow time for CCSN to make the report of its 2010 Psychological Evaluation available to Petitioners and the IEP Team.
248. The 2010 CCSN evaluation was conducted in June 2010 and received in August 2010. Petitioners did not speak with [L.D.] about the school system paying for the evaluation. In the intervening summer months, while CCSN's evaluations were being conducted and its report prepared, Respondent did not request Petitioners' consent to conduct any evaluations of [Student].
249. The only current psychological evaluation before the team that developed the 2010-11 IEP was Petitioners' privately obtained CCSN's 2010 Evaluation. The team also had before it the two prior years' CCSN evaluation reports, the 2009 CCSN Evaluation Report and the 2008 CCSN Evaluation Report. The team also had [A.L.]'s Occupational Therapy Summary and Recommendations, [##]'s Speech-Language Evaluation, [##]'s Occupational Therapy Evaluation, and all of the reports, charts, and data from the Mariposa School.
250. The team had the 2008 school sponsored evaluations including the report of [P.V.]'s classroom observations of [Student] in May of 2008.
251. Prior to the first formal IEP meeting, [L.D.] and [T.W.] met with staff from FPG to discuss [Student] and her progress at FPG. The FPG staff continued to believe that [Student] could make progress in a classroom setting and felt that she benefited from being around other children.

252. Knowing the Petitioners' preference for Applied Behavior Analysis (ABA), [L.D.] invited an ABA specialist, Casey Palmer, to the meeting. Ms. Palmer has previously consulted with the school district on explicitly incorporating ABA methodologies into structured classrooms.
253. The school district's autism specialist, [E.M.] , also reviewed the ABLLS manual and drafted goals based on the ABLLS and [Student]'s reported progress at Mariposa.
254. During the first IEP meeting, held at [XYZ] Elementary School on September 20, 2010, the team, including Petitioners and [K.F.], then [Student]'s program coordinator at Mariposa, reviewed the drafted present levels of performance and revised them based on parent input.
255. Although [L.D.] testified that the format of the IEP document typically drives the discussion, [Father] wanted to discuss [Student]'s placement before finishing the goals and objectives. After explaining that the goals and objectives drive the services and placement, [L.D.] told [Father] during the meeting that the school district had been considering which classrooms might be appropriate for [Student] and had chosen [XYZ] Elementary School for the IEP meeting because there was a self-contained classroom there that might be a good fit.
256. The teacher in that classroom was [A.B.], who had 11 years of teaching experience and had significant training and experience in working with students with autism. [A.B.]'s classroom provides students with a great deal of structure and organization, as well as a low student-teacher ratio. At the time of the hearing, there were six students in [A.B.]'s classroom, with three assistants working in the room in addition to [A.B.].
257. Related service providers also worked with students inside the classroom, and on the day that Petitioners visited [A.B.]'s classroom with [L.D.], the students were working in a one on one setting. In addition to working with students inside the classroom, related service providers can choose to work with students in a separate setting, away from other students and often do.
258. During the meeting, [A.B.] explained how she would work one on one with each student for at least 30 minutes per day and that throughout the remainder of the day, students could be one on one with other staff members, including related service providers or classroom assistants; in small groups for instruction, or participating in whole class activities like circle time with the support of one of the four adults in the classroom full-time. According to [L.D.] and [L.B.], [A.B.] remains involved with students throughout the day, even when she is not working with them one on one.
259. [M.B.] is a former autism consultant for the Respondent and was on maternity leave from the school system as of the date of her testimony. [L.B.] has a master's degree in special education and elementary education and is a Board Certified Behavior Analyst (BCBA). Prior to moving to North Carolina in 2005, she worked in New York at a school specifically for children with autism. In that setting, [L.B.] was the lead teacher in a classroom with eight students. There were also three teaching assistants and a

behavior specialist working in the classroom. At the school in New York, [L.B.] used ABA, including in one on one situations and in group work.

260. In Chapel Hill, [L.B.] worked with nine schools, in which she oversaw approximately 20 self-contained classrooms. She visited [A.B.]’s classroom two to three times per month. [L.B.] provided training to the staff, including teaching assistants, in the classrooms that she oversaw; consulted with teachers on behavior and other issues; assisted in drafting behavior intervention plans, and conducted functional assessments. [L.B.] provided all of these services to [A.B.].
261. When [L.B.] moved to N.C. in 2005 she interviewed for a position at Mariposa. [L.B.] chose not to work at Mariposa because she would not have the opportunity to work with students in a classroom setting; rather, they were one on one throughout their day. The students in her classroom in New York were at different functioning levels, and, having the students together helped the students because they could learn from each other.
262. [L.B.] testified that she has never advocated for any of her students to be one on one throughout their day, because students with autism tend to become very prompt dependent and less independent if they have somebody with them all the time.
263. Students in [A.B.]’s class have the opportunity to work independently but when they struggle with completing a task independently the classroom staff work on it individually with the student. According to [L.B.], even students who have difficulty working independently are able to benefit from being in a classroom setting.
264. According to [L.B.], at least two of the three teaching assistants in [A.B.]’s classroom have college degrees. Teaching assistants can work with students in a variety of different ways, including helping them engage appropriately, helping students remain on task, and assisting in de-escalating problem behaviors. The teaching assistants also implement behavior intervention plans with [A.B.].
265. [L.B.] testified that the best place for a student to learn classroom routines is in a classroom. The methodology employed in [A.B.]’s classroom is a cross between TEACCH and ABA, and based on her professional experience, [L.B.] believes it has been very effective.
266. The team did not finish drafting the IEP at the September 2010 meeting and reconvened on October 11, 2010, again at [XYZ] Elementary School.
267. [Father] brought to that meeting a document that had been created by [T.V.]. The team reviewed the document and in some cases incorporated the suggestions from [T.V.] into the IEP.
268. [Father] expressed concern during the IEP meeting about the level of physical therapy. Consistent with the recommendation of [B.L.], [Student]’s physical therapist at FPG, the school system’s physical therapist had recommended that [Student] be placed on a support description and evaluated for physical therapy services.

269. The school system's physical therapist, [M.R.], explained that physical therapy in the school setting is concerned with the child's ability to access the environment. [M.R.] asked to observe [Student] at Mariposa and at [XYZ] to assess [Student]'s needs.
270. Petitioners gave the Respondent permission to evaluate [Student] for physical therapy services in January 2011. As of the close of testimony, the school district had not received any suggested dates for those observations and had not initiated an evaluation.
271. After the team members finished drafting the goals and objectives, they also discussed the continuum of services and the least restrictive environment. During the discussion, the Respondent believed that [Student]'s goals could be met in a separate setting on the continuum.
272. Petitioners had provided a private evaluation and other data. No school team member asked that [Student] be evaluated, and therefore, the team did not discuss or reject further evaluations. According to [L.D.], it is not uncommon for an IEP team to draft an IEP without an evaluation that has been completed within the prior three to six months, particularly when no one of the team specifically requests an evaluation.
273. Placement in a separate classroom at [XYZ] Elementary School would have allowed [Student] some access to non-disabled peers, which [Student] does not have at Mariposa. [L.D.] testified that although [Father] believed that [Student] required direct one on one instruction throughout her entire school day, the staff who had worked with her at FPG did not agree.
274. On November 18, 2010, after three meetings convened to develop an appropriate IEP for [Student], Respondent proposed an IEP to begin November 15, 2010 and to end on September 19, 2011. The proposed 2010-11 IEP was admitted into evidence as Petitioners Exhibit Number 25. [Student]'s 2010-11 IEP provided for placement in a special education classroom for 30 hours per week, with speech therapy to be provided three times per week for 30 minutes and occupational therapy two times per week for 30 minutes. Physical therapy was initially provided through a support description, pending [Student]'s evaluation. The IEP provided that [Student]'s progress would be measured by teacher and therapists. The team also included as supplementary aids and services visual supports, adult support, and adaptive feeding equipment.
275. Petitioners filed their Petition for a Contested Case Hearing on March 31, 2010. They filed an Amended Petition for a Contested Case Hearing on November 29, 2010.

**BASED UPON** the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with



Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Parts 300 and 301.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (1993).
3. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301. Federal laws (IDEA and its regulations) prevail whenever they conflict with State laws/district policies when compliance with both is impossible or where the State laws/district policies are an obstacle to the accomplishment of the purposes and objectives of the IDEA. *Pacific Gas & Electric v. State Energy Resource Conservation & Dev. Comm.*, 461 U.S. 190 (US Sup. Ct. 1983). See also *Parks v Illinois DMH*, 554 IDELR 197 (App. Ct. IL 1982)
4. Petitioners have the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed. 2d 387 (2005). The Petitioners have the burden of proof by a preponderance or a greater weight of the evidence regarding the issues enumerated above. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing."
5. [Student] is a child with a disability for the purposes of the IDEA, 20 U.S.C. §1400 *et seq.* and a child with special needs within the meaning of N.C. Gen. Stat. 115C, Article 9. She is entitled to a free appropriate public education (FAPE) from the local education agency in which she is domiciled.
6. Respondent is a local education agency (LEA) receiving monies pursuant to the Individuals with Disabilities Education Act. The Respondent, Chapel Hill-Carrboro City Schools Board of Education, contracted with the Frank Porter Graham Child Development Center (FPG) to provide a FAPE to [Student] in the 2008-09 and 2009-10 school years.
7. The IDEA "requires States receiving federal funding to make a free appropriate public education (FAPE) available to all children with disabilities residing in the State." *Forest Grove School District v. T.A.*, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009) (citing 20 U.S.C. § 1412(a)(1)(A)). The IDEA defines a free appropriate public education as that which provides the disabled student with personalized instruction to meet the unique needs of the child, and sufficient support services to enable the student to benefit from the instruction. *Board of Education v. Rowley*, 485 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *In re Conklin*, 946 F.2d 306 (4<sup>th</sup> Cir. 1991); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4<sup>th</sup> Cir. 1990).
8. States accepting federal funds for the education of children with disabilities must adhere to two statutory obligations, one procedural and one substantive. To comply with IDEA's procedural component, the school district must follow the guaranteed procedural safeguards set forth in IDEA. 20 U.S.C. § 1415(a). Procedural violations can be held to deny a student a FAPE only if they impeded the child's right to a FAPE, significantly

impeded the Petitioners' opportunity to participate in the decision making process, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E).

9. To comply with IDEA's substantive component, the school district must develop an individualized education program (IEP) that is reasonably calculated to enable the child to receive educational benefits.
10. [Student] is entitled to the preparation and implementation of an IEP as a consequence of being identified as a child with special needs. The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4<sup>th</sup> Cir. 1985); *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575 (3d Cir. 1985). The floor of educational benefit cannot be so low as to allow the child to squander her untapped potential for learning. "Trivial education advancement" is insufficient to satisfy the requirement for a FAPE. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1998), *cert. denied*, 488 U.S. 1030 (1989). The "requisite degree of reasonable, likely progress varies, depending on the student's abilities." *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 615 (7<sup>th</sup> Cir. 2004).
11. Under IDEA, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs and enable the child to be involved in and make progress in the general education curriculum; as well as meet each of the child's other educational needs that result from the child's disability. 20 U.S.C. § 1414(d)(1)(A)(i).
12. Petitioners' primary claim regarding the 2008-09 IEP was that [Student] was denied a FAPE because her IEP was not reasonably calculated to confer educational benefit. The parties dispute how much progress was made by [Student] and whether that amount was satisfactory under the IDEA. Petitioners rely on a variety of allegations presented but particularly on the fact that [Student] did not master her IEP goals and most, if not all, of the goals were repeated to the next year. The Respondent asserts that [Student] made progress toward mastering her IEP goals and per the testimony of her teachers did, in fact, make progress.
13. Courts have held that a student's failure to master IEP goals does not compel the conclusion that the IEP was not reasonably calculated to provide FAPE. See *O'Toole by and through O'Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692 (10<sup>th</sup> Cir. 1998). Further an IEP is not inappropriate because it does not change significantly on an annual basis or because the student does not meet any of the IEP goals. See *Carlisle Area Sch. V. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).
14. Based on the language of IDEA and case law, the proper inquiry is whether [Student] made any progress, such that it could be concluded that the goals on the IEP when written, were likely to produce progress. [Father] and [Mother] emailed the staff at FPG after the August 2009 meeting. In the emails, Petitioners expressed how fortunate they felt that "[Student] had such a caring and dedicated group of teachers and therapists to foster her development." They also stated that the occupational and physical therapist's expertise was "invaluable to [Student's] growth." (R. Ex. 20). Further, according to

[Student]'s teachers, Petitioners wanted [Student] to continue at FPG in the fall of 2009, because, as they stated, they believed that FPG had been a valuable place for her progress and that she needed the opportunity to work on social integration.

15. Based on an evaluation of all the evidence, Petitioners have failed to show by a preponderance of the evidence that [Student]'s 2008-09 IEP (including the provisions for related services) was not designed to meet [Student]'s needs and enable her to make progress.
16. Turning to the June 15, 2009 to June 14, 2010 IEP, with the goals remaining the same or similar, Respondent continues to devote approximately 30 minutes each per day on Speech/Language therapy, Occupational therapy and Physical therapy with 2.5 hours per day devoted to special education instruction. The total amount of each was modified at FPG due to, as noted in the 2009-2010 IEP, "Parents have elected to enroll ([Student]) in a private special program 3 mornings per week (Mariposa School) beginning Sept. 14, 2009."
17. The evidence in this matter shows that the Respondent developed an IEP for [Student]'s 2009-2010 school year based on [Student]'s education records, additional evaluations, teacher observations and inputs, and information from private providers. Petitioners stated during the August 2009 meeting that they wanted [Student] to remain at FPG at least part time so that she could continue to benefit from the social exposure to typically developing peers. Petitioners stated that there was merit to the FPG program and the opportunities it provided [Student] to learn from peers. During the August 2009 meeting to develop the 2009-2010 IEP, the group discussed concerns about how [Student] would handle the transitions between two locations.
18. Based on an evaluation of all the evidence, Petitioners have failed to show by a preponderance of the evidence that [Student]'s 2009-10 IEP (including the provisions for related services) was not designed to meet [Student]'s needs and enable her to be involved in and make progress.
19. The main thrust of Petitioners' Petitions and evidence centers on their concern that [Student] was not being provided instruction and services, most notably, Speech Language therapy in a direct, one to one, intensive manner. Petitioner's expert witness, Dr. Powers, testified that [Student] did not have the ability to learn from modeling and from imitation of other people and was at risk from learning dysfunctional strategies to communicate. He opined that [Student] had to have direct, intensive one on one instruction in the areas of [Student]'s educational needs, social skill instructions, and speech and language interventions.
20. FPG as noted in the 2008-2009 IEP and as set forth early on with Petitioners, offered therapies in an "embedded, inclusive mode." Inclusive services educate children with disabilities in classrooms with their typically developing peers. Related services at FPG are provided in an embedded, integrated model, in which therapists join children in the classroom routines. Therapists most often work with an individual child with a disability in small group settings. The evidence in this case revealed that the therapists provide

their services by working on a specific skill, almost always with typically developing peers joining in.

21. Prior to [Student]’s enrollment, [Mother] and [Father] completed a number of forms, including the FPG Child Care Admissions Therapy Services Agreement. Among other things, the Agreement stated that therapy services would be provided in the context of classroom or playground and that intervention was ongoing every day through the interventions provided by the teachers and her therapists.
22. Addressing, first the time issue. Dr. Powers and Dr. Palmieri made several recommendations in their evaluations of [Student], including her need for 25 to 30 hours per week of direct, intensive instruction in the areas identified in their report. Witnesses for the school system testified that 30 minutes a day of direct speech and language therapy was in fact appropriate for a child of [Student]’s age. Though there was conflicting testimony regarding speech apraxia, Petitioners assert that [Student] has apraxia of speech.
23. Official Notice is taken of the American Speech-Language-Hearing Association report entitled, *Childhood Apraxia of Speech* (Technical Report) published in 2007. Under Length of Treatment Sessions, it is stated that careful consideration should be given to the length of a therapy session for younger age children. The report states that if “repetitive practice of speech-motor patterns is targeted in a therapy session, many children in the younger age ranges can remain for only a maximum of 30 minutes per session.” (page 55, *Childhood Apraxia of Speech* (Technical Report), (2007); also available from [www.asha.org/policy](http://www.asha.org/policy)).
24. Having found the 2008-09 and 2009-10 IEPs were written so as to offer meaningful educational benefit to [Student], and now finding that 30 minutes per day of direct speech and language therapy is appropriate, the issue centers on whether the FPG speech and language program was carried out so as to provide FAPE to [Student] in light of her disabilities.
25. In a speech-language therapy report (Final Progress Report for the period of January 2009 through April 2009 written by FPG intern [J.S.] for [K.D.]’s signature) of [Student]’s speech-language program at the end of the 2008-09 IEP Year, [J.S.] explained that [Student]’s acquisition of the skills necessary to deliberately produce and imitate speech sounds seemed to appear without any identifiable cause. Petitioners assert this was the result of private therapies working directly one on one with [Student]. [K.D.], the speech-language therapist working with [Student] at FPG, provided services to her in a group setting. [K.D.] did not write formal progress notes but kept anecdotal notes for herself. [K.D.] shredded her notes regarding [Student] in the summer of 2009, when she left FPG.
26. [M.D.F.], a licensed speech language pathologist, worked with [Student] at FPG for approximately two months in the fall of 2009, from September to November. As she got to know [Student], [M.D.F.] stated that she knew very clearly that [Student] needed individual, one-on-one attention. [M.D.F.] asked [K.G.], the director of FPG, if she could pull [Student] out to work with her one-on-one. At first [K.G.] agreed, but after [M.D.F.]

pulled [Student] out of the classroom for a third time, [K.G.] informed her that some of the classroom staff were upset. [M.D.F.] testified that [K.G.] told her that [Student] should be with a group all of the time. [M.D.F.] testified that, without direct intervention, which FPG was not allowing her to do, she could not effectively deliver what the IEP required.

27. Dr. Pierce was asked to return to FPG to provide speech services to students after [M.D.F.]'s replacement, [M.F.], went on maternity leave. From January 2010 until [Student] withdrew from FPG in March 2010, Dr. Pierce spent Tuesday and Thursday mornings in [Student]'s classroom and worked directly with her to provide speech services. The evidence shows Dr. Pierce engaged in direct, one on one therapy with [Student] and effectively delivered the speech therapy requirements of the 2009-10 IEP.
28. A review of all of the evidence shows that delivery of all other related services including physical therapy and occupational therapy in the 2008-09 and 2009-10 was appropriate and provided meaningful educational benefit to [Student]
29. The testimony and evidence at the hearing show that [Student] did not receive the direct one on one speech language therapy required. As such the preponderance of the evidence for these reasons and others cited in the findings of fact above yields the conclusion that Respondent failed to implement the Speech Language portion of [Student]'s IEP in April (beginning date according to the statute of limitations ruling) and May, 2009 and September through December 2009, thereby denying [Student] a FAPE in the area of speech language therapy.
30. At a February 17, 2010 meeting, Petitioners' position was that [Student] was being denied a free appropriate public education.
31. On March 1, 2010, Petitioners notified Respondent of their intent to enroll [Student] privately at public expense on or after March 15, 2010. They did so in a letter delivered to [T.W.], Respondent's LEA Representative, and [L.D.], the Executive Director of Respondent's Exceptional Children's Program. On March 15, 2010, Petitioners withdrew [Student] from FPG and [Student]'s five-day program at Mariposa began soon thereafter.
32. [L.D.] talked with Petitioners about signing releases to allow school staff to speak with [Student]'s private providers and observe [Student] at Mariposa. [L.D.] completed the releases, and the Petitioners took them home to review. Petitioners never signed the releases or gave their permission for the school district to observe [Student] at Mariposa. After sending a follow-up letter, [L.D.] received a letter from Petitioners stating that any information would have to come from their counsel.
33. After [Student] was removed from FPG, [L.D.] corresponded with the Petitioners again to request releases for [Student]'s private providers. She also asked Petitioners about developing an IEP for the 2010-11 school year. Respondent invited Petitioners to a conference to develop a new IEP for [Student]. Petitioners accepted the invitation, but requested that the conference be scheduled for later in the summer to allow time for

CCSN to make the report of its 2010 Psychological Evaluation available to Petitioners and the IEP Team.

34. During the first IEP meeting, held at [XYZ] Elementary School on September 20, 2010, the team, including Petitioners and [K.F.], then [Student]’s program coordinator at Mariposa, reviewed the drafted present levels of performance and revised them based on parent input. After explaining that the goals and objectives drive the services and placement, [L.D.] told [Father] during the meeting that the school district had been considering which classrooms might be appropriate for [Student] and had chosen [XYZ] Elementary School for the IEP meeting because there was a self-contained classroom there that might be a good fit.
35. The teacher in that classroom was [A.B.], who had 11 years of teaching experience and had significant training and experience in working with students with autism. During the meeting, [A.B.] explained how she would work one-on-one with each student for at least 30 minutes per day and that throughout the remainder of the day, students could be one-on-one with other staff members, including related service providers or classroom assistants; in small groups for instruction, or participating in whole class activities like circle time with the support of one of the four adults in the classroom full-time. The methodology employed in [A.B.]’s classroom is a cross between TEACCH and ABA.
36. On November 18, 2010, after three meetings convened to develop an appropriate IEP for [Student], Respondent proposed an IEP to begin November 15, 2010 and to end on September 19, 2011. The proposed 2010-11 IEP was admitted into evidence as Petitioners’ Exhibit Number 25. [Student]’s 2010-11 IEP provided for placement in a special education classroom for 30 hours per week, with speech therapy to be provided three times per week for 30 minutes and occupational therapy two times per week for 30 minutes. Physical therapy was initially provided through a support description, pending [Student]’s evaluation. The IEP provided that [Student]’s progress would be measured by teacher and therapists. The team also included as supplementary aids and services visual supports, adult support, and adaptive feeding equipment.
37. The Petitioners assert that [Student] would be at significant risk of skill loss or failure to make necessary gains to support appropriate increases in independence if she is not placed in a program that has a well-established service delivery process for utilizing Applied Behavior Analysis (ABA) teaching methodologies. And Petitioners further believe the only setting where [Student] is certain to improve her skills is where she has access to a one-to-one instructional aide throughout her entire day for a minimum of 30 hours of one-to-one instruction per week, which is not provided for in the 2010-2011 IEP.
38. The Respondent asserts that the specific instruction supported by Petitioners is not required by the IDEA so long as [Student]’s IEP is designed so that she can make some progress in school.
39. Under *Board of Education v. Rowley*, 485 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), review is made of whether [Student]’s 2010-2011 IEP was “reasonably calculated to enable (her) to receive educational benefits.” *Rowley*, 485 U.S. at 207. The Supreme Court has explained that this standard is not a burdensome one. “Congress did not

impose upon the States any greater substantive educational standard than would be necessary to make... access meaningful.... The intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Rowley*, 485 U.S. at 192. *Rowley* clearly holds that a program is appropriate if it confers some educational benefit. It does not need to be superior to the alternatives. *Rowley*, 485 U.S. at 200

40. Based on case law and the appropriate standard of review, the Undersigned is compelled to concur with the Respondent. Based on a review of the record including all testimony received and all other evidence, Petitioners have failed to carry their required burden of establishing that [Student]’s 2010-2011 IEP failed to meet the required IDEA standards.
41. Having determined that the Respondent can provide [Student] with a FAPE, the question becomes whether the district’s proposed location is the least restrictive environment.
42. Petitioners set forth that placement at Mariposa should be considered the more appropriate and effective, thereby less restrictive, setting than placement with Respondent school district. The parents contend that only placement at Mariposa as recommended by their experts could provide [Student] with the required direct intensive instruction and services needed for her to make progress.
43. Respondent asserts that [Student]’s placement at Mariposa is a factor to be considered in light of IDEA’s least restrictive environment requirement. Mariposa is a separate school, exclusively for students with disabilities. The classroom proposed by the Respondent, which would provide [Student] with the opportunity for access to non-disabled peers, is less restrictive than the private program chosen by Petitioners, which serves only students with disabilities. Testimony at hearing established that [Student]’s access to her peers and social interaction was limited in her private program, given its structure.
44. The IDEA requires that school districts provide a FAPE in the least restrictive environment (LRE) possible. 20 U.S.C. § 1412(a)(5). In order to satisfy the LRE requirement in selecting the appropriate placement along the continuum of alternatives, a “district must mainstream (a student), that is, provide (her) an education with (her) nondisabled peers to the greatest extent appropriate.” *Beth B. v. Van Clay*, 282 F.3d 493, 498 (7<sup>th</sup> Cir. 2002). IDEA seeks to maximize the contact that children with disabilities have with their nondisabled peers. Congress has clearly set forth a policy decision in favor of mainstreaming to which the courts must abide by. Petitioners’ assertions that the proposed placement set forth by the Respondent is not the least restrictive environment thus fails.
45. Petitioners raised the issue of the lack of an offering of extended school year (ESY) services. ESY programming is educational programming which extends instruction beyond the conventional school year to prevent serious regression over the summer months. Neither federal nor state law requires that every disabled student receive ESY services as part of his or her IEP. But these laws do require that school districts make ESY services available in those cases in which a disabled student needs ESY services in order to receive a FAPE. Testimony at the hearing suggests that Petitioners misunderstood the nature of the services available within the school system and rejected

those services on the basis of that misunderstanding. Having found that each of the IEPs was written so as to offer FAPE, Petitioners have failed to prove by a preponderance of the evidence that [Student] was denied Extended School Year services.

46. Petitioners assert that the Respondent denied [Student] a FAPE by “delegating its responsibility as a Local Educational Agency to design, implement, and monitor [Student]’s IEP without establishing the safeguards and oversight sufficient to ensure that [Student]’s IEP was appropriate in light of her unique needs and that FPG actually implemented it.”
47. IDEA requires local boards of education to identify, evaluate, and place children with disabilities. The statute also requires local boards to annually convene an IEP team meeting consisting of the required members, to conduct a re-evaluation meeting no less than every three years, and to provide parents of children with disabilities with various notices of rights at specified points in the process. The preponderance of the evidence in this case finds that the Respondent has met its obligations in this regard.
48. Petitioners assert that the Respondent denied [Student] a FAPE by failing to properly evaluate [Student] and failing to issue a prior written notice in connection with the IEP Team’s decision not to seek evaluations recommended by [Student]’s original evaluators and CCSN.
49. The IDEA requires a local board to identify and evaluate children suspected of having a disability for the purposes of identifying such children and providing them with a free appropriate public education. 34 C.F.R. §§300.111, 300.301. [Student] was evaluated in accordance with that requirement. The Board is required to conduct a re-evaluation no more than once a year and no less than every three years, unless the Board and parent agree otherwise. 34 C.F.R. §300.303. This hearing ended prior to three years elapsing since [Student]’s initial evaluation.
50. Review of case law and Office of Civil Rights and Office of Special Education Programs opinions reveal that conditions which warrant reassessment or additional assessment include such things as severe decline in student’s grades, incidents (acting out) causing disciplinary action, observations by teachers indicating the need for additional, nonduplicative testing as well as parent requests with supporting data. Petitioners have failed in their burden of proof that such concerns rose to the level of conditions that warranted additional assessments or a reassessment of [Student] particularly in light of the parents providing CCSN Evaluations and observations by [Student]’s educators and therapists.
51. Petitioners seek payment of the CCSN Evaluations reviewed in the IEP process for the years advanced in this case. Parents are allowed to obtain an IEE for their child at any time but must follow federal guidelines to receive one at public expense. 34 C.F.R. § 300.502. In all instances, Petitioners failed to follow those requirements and are not entitled to reimbursement for the IEEs at the Center for Children with Special Needs (CCSN) in Glastonbury, Connecticut.



52. Petitioners assert that [Student] was denied services provided by qualified teaching and related service professionals. In accordance with 34 C.F.R. §300.18(f), “Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under Sec. 300.151 through 300.153 about staff qualifications with the SEA as provided for under this part.”
53. Likewise under 34 C.F.R. §300.156(e), “Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part.” Petitioners have failed to prove their assertions by a preponderance of the evidence that [Student] was denied FAPE as a result of allegations related to teacher or other school personnel qualifications.
54. The IDEA specifically provides for two approaches to administrative challenges in special education matters. A parent is entitled to “an impartial due process hearing, which shall be conducted by the State educational agency [SEA] or by the local educational agency, as determined by State law or by the State educational agency.” 20 U.S.C. § 1415(f)(1)(A). The local education agency is the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA. *See* 34 C.F.R. Part 300.511
55. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law. The OAH is not the public agency directly responsible for the education of the child and thus does not conduct a hearing on behalf of the Local Educational Agency (LEA) but by and on behalf of the State Educational Agency (SEA). An OAH decision in special education matters is a final decision.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

### **FINAL DECISION**

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

The Undersigned is mindful of the challenges faced by the Petitioners and was impressed throughout the hearing with Petitioners, [Father] and [Mother], who are extremely involved parents, in seeking the best of all things that they possibly can for [Student]. Through IDEA, Congress seeks to improve educational results for children with disabilities and provide

assistance through the Act to ensure equality of opportunity. The Act does not, however, require that States do whatever is necessary to achieve a particular level of education, but calls for an individualized education program reasonably calculated to enable a student to make some progress toward his or her goals. As found in the Supreme Court case of *Board of Education v. Rowley*, cited above, it does not need to be superior to the alternatives.

The IEPs developed for [Student] in all school years covered by this Final Decision and the placements and recommended placement were appropriate to meet the standards outlined in IDEA.

[Student] was, however, denied FAPE when she was not provided appropriate speech language services for the months of April 2009 through May 2009 and September 2009 through December 2009. The Undersigned exercising equitable discretion in the matter, and taking into account a multiplicity of factors as cited in the findings of fact and conclusions of law holds that Petitioners should be reimbursed for sixty (60) hours (6 months x 4 weeks x 2.5 hours) of speech language services and appropriate transportation expenses for the applicable time period. The delivery of services in all other areas including but not limited to occupational therapy and physical therapy was appropriate and offered [Student] a free appropriate public education.

Based on the conclusions and the facts in this case, the Undersigned holds that in all other issues in this case, Petitioners failed to carry their burden of proof by a greater weight of the evidence that FAPE was denied in educational programming or the delivery of services. Respondent's IEPs for the 2008-09 year and the 2009-10 year, and the Respondent's proposed IEP for the 2010-11 year, for [Student] were appropriate to address her special needs so as to provide her with FAPE in the least restrictive educational environment. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Having the burden of proof, Petitioners' evidence did not overbear in that degree required by law the weight of evidence of Respondent.

### **NOTICE**

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with 20 U.S.C. § 1415(f), the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." In accordance with 20 U.S.C. § 1415(g), "if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. See 20 U.S.C. § 1415(i).

Under North Carolina’s Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, “any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices.”

Inquiries regarding further notices and time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

**IT IS SO ORDERED.**

This is the 7<sup>th</sup> day of October, 2011.

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Augustus B. Elkins II  
Administrative Law Judge